Applicant Details

First Name	**Benjamin**
Last Name	**Horton**
Citizenship Status	**U. S. Citizen**
Email Address	**bhorton@jd21.law.harvard.edu**
Address	**Address** Street **9 Cranston Street** City **Boston** State/Territory **Massachusetts** Zip **02130** Country **United States**
Contact Phone Number	**585-730-2894**

Applicant Education

BA/BS From	**Skidmore College**
Date of BA/BS	**May 2012**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 27, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Law and Policy Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Minow, Martha
minow@law.harvard.edu
617-495-4276
Fein, Ronald
rfein@freespeechforpeople.org
617-244-0234
Tribe, Laurence
tribe@law.harvard.edu
617-495-1767

This applicant has certified that all data entered in this profile and any application documents are true and correct.

BENJAMIN HORTON
9 CRANSTON STREET, APT #1 BOSTON, MA 02130 • 585-730-2894 •
BHORTON@JD21.LAW.HARVARD.EDU

April 24, 2022
The Honorable Indira Talwani
U.S. District Court, District of Massachusetts
John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, MA 02210

Dear Judge Talwani:

I am a recent graduate of Harvard Law School, and I am writing to express my interest in a clerkship in your chambers starting in 2022. I have lived in Massachusetts for almost a decade, I am a member of the Massachusetts bar, and I plan on continuing to practice law here.

Before law school, I served in AmeriCorps in Boston Public Schools and worked in a number of roles: tutor, teacher, advisor. I concluded that, as a First-Generation college student, working in an access program at a college would be personally fulfilling and satisfy my interest in public service work. But while earning the requisite M.A., I took an education law course and was captivated. At the same time there was spike in speech issues on campus and I became fascinated by the tension between political equality and free expression. I pursued law school to investigate and help mitigate the tension between those ideals through a public interest career in law.

Much of my time at HLS, from coursework to clinics to summer internships, to independent research projects, focused on that goal. I was active in the *Harvard Law and Policy Review*, reviewing and editing online submissions as an online editor. I continue to work at the intersection of free expression and political equality at Free Speech For People, a non-profit that litigates and advocates for free and fair elections. I have worked on litigation involving Section Three of the Fourteenth Amendment, from research, to drafting complaints, to briefing before state and federal courts. I also conducted research to support anti-voter suppression litigation and campaign finance advocacy.

While interning at the Supreme Judicial Court of Massachusetts I found I really enjoyed the challenge of encountering an unfamiliar area of law, quickly digesting it, and applying it to a given case. I want to clerk because I want to continue to encounter that challenge and variation. And I know there is no better introduction to litigating in federal courts than a District Court clerkship.

Enclosed you will find my resume, law school transcript, undergraduate transcript, and two writing samples. You will be receiving letters of recommendation from:

Prof. Laurence Tribe Harvard Law School tribe@law.harvard.edu (617) 495-1767	Prof. Martha Minow Harvard Law School minow@law.harvard.edu (617) 495-4276	Ron Fein, Legal Director Free Speech For People rfein@freespeechforpeople.org (617) 244-0234

I am happy to provide any additional information you may require. Thank you for your time and consideration.

Best,

Ben Horton

BENJAMIN HORTON

9 Cranston Street, Apt #1 Boston, MA 02130 • 585-730-2894 •
bhorton@jd21.law.harvard.edu

EDUCATION

HARVARD LAW SCHOOL, J.D., *Cum Laude* May 2021
Activities: *Harvard Law and Policy Review*, Online Editor
Democracy and the Rule of Law Clinic, Spring 2021
Cyberlaw Clinic, Spring 2020

BOSTON COLLEGE, M.A., Higher Education Administration, *Magna Cum Laude* May 2018

SKIDMORE COLLEGE, B.A, English, Philosophy, *Summa Cum Laude*, with Honors May 2012

LEGAL EXPERIENCE

FREE SPEECH FOR PEOPLE, Newton, MA 2021–2022
Harvard Law School Public Service Venture Fund Law Fellow
Working on litigation based on Section Three of the Fourteenth Amendment, including legal research, complaint drafting, and briefing before federal and state courts. Also conducted research to support anti-voter suppression litigation, litigation to enforce the FECA, campaign finance advocacy, and co-wrote a FOIA request.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, Boston, MA (remote) Fall 2020
Judicial Intern
Wrote monthly memos discussing a case prior to oral argument and recommending an outcome, weekly memos discussing applications for further appellate review and recommending an outcome and conducted discrete research projects to aid judicial clerks.

CENTER FOR DEMOCRACY AND TECHNOLOGY, Washington, D.C. (remote) Summer 2020
Legal Fellow
Conducted legal and policy analysis of Section 230 reform efforts, drafted a report concerning online voter suppression, and drafted responses to the upcoming EU "Digital Services Act," wrote a blog post on Section 230 reform and co-wrote a guide on misinformation for election officials.

AMERICAN PROMISE, Cambridge, MA Summer 2019
Law Fellow
Provided legal research and analysis in support of a 28th Amendment to overturn *Buckley* and its progeny, including drafting amendment language and defending proposals from common criticisms.

PUBLICATIONS

The Hydraulics of Intermediary Liability Regulation, 70 CLEVELAND STATE L. REV. 201 (2022)

January 6 shows why corporate political spending is bad for democracy, TRUTHOUT (Dec. 2021)

Online Voter Suppression: A Guide for Election Officials on How to Spot & Counter, CTR. FOR DEMOCRACY AND TECH. BLOG (October 16, 2020) (co-author)

EARN IT's State-law Exemption Would Create Bewildering Set of Conflicting Standards for Online Speech, CTR. FOR DEMOCRACY AND TECH. BLOG (August 11, 2020)

CDA 230 Goes North *American? Examining the Impact of the USMCA's Intermediary Liability Provisions in Canada and the United States*, CIPPIC-CYBERLAW CLINIC (July 2020) (contributor)

Online Censorship Is Unavoidable—So How Can We Improve It?, HARV. L. & POL'Y REV.: NOTICE & COMMENT (May 23, 2020)

INTERESTS/EXPERIENCES

Prior to law school I worked as a faculty assistant at Boston College for three years and served as an Americorps participant in Boston Public Schools with City Year and Citizen Schools for three years. During law school I volunteered with the American Constitution Society's Constitution in the Classroom program, I am an Eagle Scout, and in my spare time I enjoy reading and writing fiction.

Harvard Law School

Date of Issue: May 27, 2021
Not valid unless signed and sealed
Page 1 / 2

Record of: Benjamin Horton
Current Program Status: Graduated
Degree Received: Juris Doctor May 27, 2021 Cum Laude
Pro Bono Requirement Complete

JD Program

Fall 2018 Term: August 29 - December 20

1000	Civil Procedure 4 Cohen, I. Glenn	H	4
1001	Contracts 4 Frug, Gerald	P	4
1006	First Year Legal Research and Writing 4A Frampton, Thomas	P	2
1003	Legislation and Regulation 4 Tarullo, Daniel	H	4
1004	Property 4 Tushnet, Rebecca	H	4

Fall 2018 Total Credits: 18

Winter 2019 Term: January 07 - January 25

1054	Advocacy: The Courtroom and Beyond Gershengorn, Ara	CR	3

Winter 2019 Total Credits: 3

Spring 2019 Term: January 28 - May 17

2035	Constitutional Law: First Amendment Field, Martha	P	4
1002	Criminal Law 4 Kroger, John	P	4
1006	First Year Legal Research and Writing 4A Frampton, Thomas	P	2
1016	Human Rights and International Law Neuman, Gerald	H	4
1005	Torts 4 Sargentich, Lewis	P	4

Spring 2019 Total Credits: 18
Total 2018-2019 Credits: 39

Fall 2019 Term: August 27 - December 18

2034	Constitutional History I: From the Founding to the Civil War Klarman, Michael	H	3
2036	Constitutional Law: Separation of Powers, Federalism, and Fourteenth Amendment Minow, Martha	P	4
2897	Contemporary Issues in Constitutional Law Liu, Goodwin	H*	2
	* Dean's Scholar Prize		
2030	Defending Constitutional Democracy Tribe, Laurence	H	2
2779	The Senate as a Legal Institution Feingold, Russell	H*	4
	* Dean's Scholar Prize		

Fall 2019 Total Credits: 15

Winter 2020 Term: January 06 - January 24

2928	Election Law Stephanopoulos, Nicholas	H	3

Winter 2020 Total Credits: 3

Spring 2020 Term: January 27 - May 15

Due to the serious and unanticipated disruptions associated with the outbreak of the COVID19 health crisis, all spring 2020 HLS academic offerings were graded on a mandatory CR/F (Credit/Fail) basis.

2616	Advanced Constitutional Law: New Issues in Speech and Press Freedom Albert, Kendra	CR	1
2651	Civil Rights Litigation Michelman, Scott	CR	3
8004	Cyberlaw Clinic Bavitz, Christopher	CR	3
2674	Cyberlaw Clinic Seminar Bavitz, Christopher	CR	2
2086	Federal Courts and the Federal System Goldsmith, Jack	CR	4

Spring 2020 Total Credits: 13
Total 2019-2020 Credits: 31

Fall 2020 Term: September 01 - December 31

2042	Copyright Tushnet, Rebecca	H	4
3020	Freedom of Speech Frontiers: Comparative and Global Perspectives Minow, Martha	H	2
8099	Independent Clinical - Supreme Judicial Court of Massachusetts Fjeld, Jessica	CR	4
7000W	Independent Writing Minow, Martha	H	2

continued on next page

Harvard Law School

Record of: Benjamin Horton

Date of Issue: May 27, 2021
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2169	Legal Profession: Collaborative Law Hoffman, David	H	3
	Fall 2020 Total Credits:		15
	Winter 2021 Term: January 01 - January 22		
2507	State Constitutional Law Bowie, Nikolas	H	2
	Winter 2021 Total Credits:		2
	Spring 2021 Term: January 25 - May 14		
2753	Advertising Law Tushnet, Rebecca	R	3
8049	Democracy and the Rule of Law Clinic Nadeau, Genevieve	H	4
3063	Identity in American Literature of the 1940s Tarullo, Daniel	CR	1
7000W	Independent Writing Tushnet, Rebecca	H	2
2994	Legal Tools for Protecting Democracy and the Rule of Law in America Nadeau, Genevieve	H	2
2005	The Warren Court Klarman, Michael	H	2
3500	Writing Group: Intellectual Property Tushnet, Rebecca	CR	1
	Spring 2021 Total Credits:		15
	Total 2020-2021 Credits:		32
	Total JD Program Credits:		102

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Benjamin Horton
Skidmore College
Cumulative GPA: 3.893

Fall 2008

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Fiction		A	3	
Human Dilemmas		A	4	
Intro to Literary Studies		A	4	
Intro to Political Philosophy		A-	3	

Spring 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Chemical Principles I		B+	4	
Intro to American Gov't		A	3	
Intro to Fiction Writing		A	4	
Intro to Islamic Civilation		A	3	
Intro to Philosophy		A	3	

Fall 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Fiction Workshop		A-	4	
History of Philsophy: Early Modern		A	3	
Literature and the Environment		A-	3	
Peer Tutoring Project		A	4	
Wittgenstein		A	4	

Spring 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Alternative Second Semester Spanish		A-	3	
Chaucer		A	3	
Chaucer - Independent Study		A	1	
History of Philosophy - Greek		A	3	
Intro to Nonfiction Writing		B+	4	
Theories of Literary Criticism		A-	3	

Fall 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
18th Century Novel		A	3	

Advanced Fiction Workshop	A	4
American Philosophy	A	4
Politics and the Novel	A	3
Seminar in Kant	A	4

Spring 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
From Modern to Postmodern		A-	4	
Irish Literature/1800 to Present		A-	4	
Worlds Beyond Oxford		A-	4	
Writings of Virginia Woolf		A-	4	

I studied abroad this semester in the Advanced Studies in England program in Bath. Although I was assigned grades, they did not count toward my cumulative GPA.

Fall 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
19th Century American Literature		A	3	
American Modernisms		A	3	
Existential Philosophy		A-	4	
Independent Study in Philosophy		A	3	This class was an independent study on Plato and Aristotle's views on friendship
Peer Mentor Experience		A	2	
Peer Mentor Seminar		Credit	1	This class was graded credit / fail

Spring 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Project in Writing		A	4	
American Landscape and Literature		A	3	
Cather		A	3	
English Romanticism		Audit	0	
Milton		A	3	

Grading System Description

Skidmore College uses a standard unweighted grading system, where A+ and A receives 4.0 points, A- 3.67, B+ 3.33, B 3.0, B- 2.67, C+ 2.33, C 2.0, C- 1.67, D+ 1.33, D 1.0, F 0.

April 24, 2022

The Honorable Indira Talwani
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 4-710
Boston, MA 02210-3002

Dear Judge Talwani:

It is a genuine pleasure for me to write in support of Ben Horton who is applying to work as your law clerk. He has a tremendous work ethic; he is analytically sharp; and he has impressed me both in class and in an independent writing project.

As a student in my 100-person Constitutional law class, Ben was invariably prepared and alert to complexities and tensions in emerging doctrines. In addition to the usual class participation and final exam, I require each student to participate in an in-class moot court on a pending case, and to submit in advance written summaries of key arguments and after the class, written reflections on unexpected or challenging issues that came up in discussion. Ben's case involved a difficult Equal Protection challenge to voting districts. He ably dug into the record, showed not only real understanding but a valuable theory of the case, and offered perceptive reflections after the case. Although his final written exam fell just short of an honors grade, he left a strong impression of real talent from his work in the course. (I see from his transcript he has excelled in other classes).

I was pleased when he proposed an independent writing project after the course. I confess I learned more from his project (it will be a student Note) than he may have learned from me. He identified an intriguing piece of legislation, developed several lines of constitutional analysis to test whether it would and should survive challenge, and assesses the probable impact of the regulatory approach if enacted and successful in defeating constitutional challenges. The proposed federal statute would combat "social media addiction" with a range of regulations. Ben identified several that he argues are content-neutral and aim at introducing "friction" into the social media experience by banning such elements as "Infinite Scroll" (connecting the viewer to endless further posts); "Elimination of Natural Stopping Points," and "Autoplay." Impressively, he locates the bill in the context of a range of permitted and rejected regulatory efforts and in light of behavioral economics ideas about "nudging" the behavior of individuals; he shows how it pushes the boundaries of what is "deceptive" or "misleading" speech to include "manipulative" practices.

In the paper, Ben deftly mounted the frameworks provided from both commercial speech and core political speech doctrines. He made a convincing argument that the regulations could plausibly be characterized both as falling into the "uncovered" zone of commercial speech but also provided analyses should that argument fail to convince a court and trigger scrutiny under either a mid-tier or strict basis. Here, his paper makes more sense of the proliferating variety of "intermediate scrutiny" analyses than I have seen elsewhere while also making a strong case that strict scrutiny would not apply. After providing subtle comparisons of many opinions, the paper usefully notes: "To summarize, there is not a huge divide between the commercial speech cases and the content-neutral cases as to how the Court considers the evidence required to prove both the extent of the harm and the extent to which the statute furthers the government interests. In both cases, it is generally not sufficient to rely on a single study or on hearsay, but in certain cases in the content-neutral context the Court will allow "common sense" analyses. There is a large difference between the requirement of less burdensome alternatives." The paper also weighs the precedential value of content-neutral cases is uncertain in light of the passage of nearly 30 years since a clear application by the Supreme Court of the tailoring prong of intermediate scrutiny outside the commercial context and shifting membership of the Court and examines the law in light of more remote precedents. All told, it is a highly professional and shrewd analysis that has informed my understanding and thinking.

In our discussions about the paper, Ben responded with eagerness to comments and criticisms and revised the paper with alacrity. He also showed he has read and internalized material well beyond what he used in the paper. His conversation sparkles with ideas. It was therefore especially rewarding to hear his contributions this past fall in a seminar I co-taught on for others in freedom of expression law. The seminar drew on comparative responses to digital medial issues. Ben brought insights from his summer work at the Center for Democracy and Technology. There he worked on reform ideas for Section 230 of the Communication Decency Act, European Union approaches to liabilities of intermediaries like Facebook, Google, and other platform companies, and an online anti-voter suppression guide that was distributed to local election officials.

In addition to astute comments in class, Ben wrote one paper comparing the limited utility of international hate speech norms with U.S. treatments of speech in libraries, newspapers, and performance venues. He then wrote a longer paper recommending that regulators focus on the intrusive aspects of social media and target the subset of locations where misinformation develops and spreads. Talking with Ben about such issues is like talking with a colleague. He has developed sophistication and expertise; he is also continuing to probe and ask great questions as he works this spring with a nonprofit group and clinic called Protect Democracy. There, he is immersed in on anti-voter suppression litigation and is researching ways to revitalize local news. I conferred with the team on this second issue and once more, saw Ben engaging as a peer with the lawyers.

I have learned that Ben is the first in his family to go to college, and entered college off a wait-list. He went on to graduate summa cum laude, and clearly has enormous talent. He remains humble and unpretentious. He writes clearly and rapidly. He is also well-liked by other students. He has been deeply involved in our Cyblerlaw Clinic where he worked on a range of issues including surveillance and censorship laws in Ethiopia and investigating the effects of the USMCA on Canadian online platform

Martha Minow - minow@law.harvard.edu - 617-495-4276

liability. He worked at a campaign-finance non-profit that advocates for a constitutional amendment to overturn Supreme Court decisions rejecting campaign finance regulations, and got to have the really unique experience of essentially being an in-house academic. I very much appreciate Ben's self-awareness: he is not a free speech absolutist and has concerns about some current uses of the First Amendment while also caring very much about its fundamental values. He helped the nonprofit organization address current campaign regulation issues dealing with electioneering language, the Press Clause, and how the Court would use its existing campaign finance doctrine in a post-amendment world while also working on a possible constitutional amendment draft. This work fueled his course work and independent writing this year. This kind of focus shows initiative and drive. Longer term, he hopes to pursue work in consumer protection, privacy, and the First Amendment.

Ben has the maturity gained in three years working through AmeriCorps and also working as a faculty assistant at Boston College. He does not have resources from his family and has supported himself through school. He entered Harvard with a belief in meritocracy but awareness that life circumstances can lead to an underrepresentation of students coming from low-income families. I know that he admires his peers for their intelligence and hard work and genuinely appreciates the collaborative spirit of his classmates and alumni. His sense of appreciation, his tenacity, and his clarity are among his distinctive qualities. He is so thoughtful and analytic; he is also kind.

He received the honor of a competitively-awarded fellowship supporting post-graduation public service work. As a fellow with Free Speech For People (an elections non-profit organization) he is embarked on a project to keep those who helped plan or promote the January 6 insurrection off the ballot for future elections, pursuant to Section Three of the Fourteenth Amendment. This effort includes litigation already launched and other efforts in the works. In this work, he is developing real skills as a litigator as well as combining factual investigation with conceptual work.
I am confident that Ben will be a truly outstanding clerk. I would hire him in a minute, and I recommend him highly.

Sincerely,

Martha Minow
300th Anniversary University Professor
Former Dean
Harvard Law School

Confidential letter of recommendation for Benjamin Horton

January 28, 2022

To whom it may concern:

I am pleased to recommend Ben Horton, who currently works under me as a Harvard Law School Public Service Venture Fund Fellow in his first year after law school, for a clerkship in your chambers. I believe he would be an outstanding clerk.

About the recommender
I direct the legal advocacy program at Free Speech For People, a national nonpartisan nonprofit public interest advocacy organization focused on cutting-edge impact litigation, policy development, and public education to uphold our constitutional democracy. Our national litigation docket is exclusively impact litigation, often undertaken in cooperation with an outside pro bono firm. I am intimately familiar with the responsibilities of a federal judicial clerk, as I clerked for the Honorable Douglas P. Woodlock in the District of Massachusetts (2003-04) and the Honorable Kermit V. Lipez on the First Circuit (2004-05).

Ben's role and work at Free Speech For People
As a Public Service Venture Fund Fellow, Ben functions essentially as a staff attorney under my supervision. I would like to highlight two projects in particular that Ben has worked on.

First, he evaluated a potential challenge to an aspect of an investigation launched by a committee of the Pennsylvania state senate into allegations of "fraud" in the 2020 election; the specific subject was a subpoena issued to state officials to turn over a voter file, including information not available to the public, for use by a private third-party contractor. Ben evaluated the viability of challenging this subpoena in

1320 Centre Street, Suite 405, Newton, MA 02459 O 617.244.0234 F 512.628.0142 www.freespeechforpeople.org

federal court under Section 11(b) of the Voting Rights Act of 1965, 52 U.S.C. 10101(b), which prohibits intimidation of voters.[1]

This project posed two distinct types of research challenges. First, there is very little judicial precedent under Section 11(b), and only three cases in its history (one of them won by our organization late in 2020) where equitable relief was awarded by the court. Second, as Ben came to discover, the case would be rife with non-merits complications, including standing, ripeness, state sovereign immunity, the similar but distinct federal common law doctrine of legislative immunity, arguments for abstention in favor of a pending state proceeding, and more. Furthermore, as Ben noted, these issues would play out differently depending on when we might file a complaint.

Evaluating the viability of this action required Ben to spot and anticipate a wide range of potential arguments in opposition to our proposed complaint. He did this independently and objectively, deftly addressing a broad range of federal jurisdiction complications that would beset the litigation even before we reached any merits issues under the Voting Rights Act. Furthermore, he did so with minimal hand-holding. (I confess that I had not even heard of the federal common law doctrine of legislative immunity until Ben raised it in our discussions.) Although we are an advocacy organization that is not afraid to tackle uphill or even "longshot" cases, Ben's professional and objective analysis of the obstacles that we would face persuaded us not to pursue it further based on the present facts.

Ben's second major project has caught the attention of the New York Times and other media.[2] In late 2021, our organization began to explore applying state law candidacy challenge procedures to individuals who were involved in the events of January 6, 2021, on the basis of disqualification by Section Three of the Fourteenth Amendment.

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[1] We have authorized his use of an edited excerpt of this memorandum as a writing sample.

[2] *See, e.g.,* Jonathan Weisman, *Cawthorn Challenge Raises the Question: Who Is an 'Insurrectionist'?*, N.Y. Times, Jan. 25, 2022, https://nyti.ms/32GtTzV.

Embedded within this project were dozens of complex legal questions, most of first impression. To address these questions, Ben was required to draw creatively upon a wide range of legal research skills and materials. For example, to determine a usable meaning of "insurrection" under Section Three of the Fourteenth Amendment, Ben combined several modes of constitutional interpretation: original intent and original public meaning based on historical materials from the mid-19th century; post-ratification historical practice; and modern judicial precedent defining the term in other contexts. He also researched and analyzed a broad range of other first-impression questions both constitutional (e.g., whether the Qualifications Clause preempts state adjudication of congressional candidate eligibility) and procedural (e.g., regarding operation of particular state law candidacy challenge procedures). Besides his extensive legal memoranda, Ben took a substantial role in assembling facts for the first such challenge we have filed, and wrote the first draft of the complaint.

While Ben has worked on other projects as well during his time here, I highlight these two not only because of the amount of his time involved, but also because they demonstrate full-spectrum legal research, thinking, and writing. Collectively, these two projects demonstrate Ben's exceptional competence in everything from a scholarly analysis of primary materials from the 1860s, to "bread-and-butter" federal courts topics such as standing, ripeness, and sovereign immunity, to down-in-the-weeds factual analysis.

Impressions and recommendation

I believe Ben has several attributes that would make him an outstanding addition to your chambers.

First, he operates at the highest level of intellectual capability. He is undaunted by intellectually complex topics, and holds his own in conversations with our outside expert witness law professors. I often bounce my own ideas off him. No legal topic will be too difficult for him.

Second, while he does tend towards an intellectual bent, he is entirely comfortable with the types of jurisdictional, procedural, and other non-merits issues that often accompany federal litigation, as well as getting his hands dirty in a factual record.

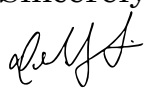
Third, he works independently and with earned confidence. Early in his time with us, I assigned him to smaller projects (e.g., a Freedom of Information Act appeal) and checked every case citation to ensure that he was describing the case accurately. I also would, after receiving his draft, do my own research to make sure that he hadn't missed something else. I can confirm, based on experience, that it is not necessary to do this with Ben's work.

Of course, no one is perfect. When he started with us in mid-September, Ben's writing style in memoranda was somewhat more academic than some might prefer; I have been working with him on this. Also, as will be apparent from his transcript, he did not take Evidence or trial advocacy in law school; as a result, I believe his understanding of the rules of evidence derives entirely from the bar preparation class.

But these are minor points. I believe that, if you choose Ben to serve in your chambers, he will quickly earn your confidence as someone who can be asked to evaluate a difficult motion or appeal, research the parties' arguments, recommend an outcome (if that is your request), and draft a high-quality bench memorandum or opinion. His legal research and writing skills, and his judgment, are superb. In terms of personal characteristics, he is a pleasure to work with in every way.

I would, of course, be happy to answer any questions you may have over the telephone.

Sincerely,



Ronald A. Fein
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April 25, 2022

The Honorable Indira Talwani
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 4-710
Boston, MA 02210-3002

Dear Judge Talwani:

I hope you will give serious consideration to the application of Benjamin Horton, who received his J.D. Cum Laude from Harvard Law School in May 2021. Ben graduated from Skidmore College with a B.A. in English Summa Cum Laude in 2012, receiving the Edwin Moseley Award, awarded to just one senior English major each year. He received an M.A. from Boston College Magna Cum Laude in 2018.

Ben's background between college and law school is among the things that most appealed to me when I selected him as one of a small handful of students from more than a hundred applicants for an advanced constitutional law seminar I offered here in Fall 2019. In essence, he dedicated himself to the education of underprivileged kids in the Boston schools. Specifically, Ben spent 2012-2013 as a City Year Corps Member for City Year Boston, serving over 1,700 hours mostly in a turnaround high school in Boston, supporting a cohort of ninth-graders in attendance, behavior, and coursework, providing targeted interventions in Freshman English and introductory Algebra. He then served from 2013 to 2015 as Teaching Fellow for Citizen Schools in Boston, coaching a team of eighth-graders through the high school application process, the basics of the job application process, and the development of study skills to succeed in high school. During that period, he taught a sixth-grade math class and performed a range of administrative functions including the management of the campus budget and the scheduling of daily after-school programming. During 2015-2018, Ben was Program Assistant for Information Systems & Managing for Social Impact at Boston College, reviewing electives, planning events, advising students, and executing the logistics of hands-on learning experiences in the technology sector. In that role he also processed expense reports, maintained faculty and department budgets, scheduled classes, and updated the Information Systems Department website.

Ben then shifted emphasis from directly educating underprivileged kids to addressing the systemic problems he saw as impeding the ability of our political institutions to focus on the problems of the disadvantaged. To that end, he became a Law Fellow with American Promise in Cambridge, providing legal research and analysis in support of that organization's mission to enact a 28th Amendment to overturn Buckley v. Valeo and its progeny in order to limit the influence of wealth and corporate power in American politics.

As a student at Harvard Law School beginning Fall 2018, he received Honors grades in Legislation and Regulation, Civil Procedure, Property, Human Rights and International Law, Constitutional History I: From the Founding to the Civil War, Defending Constitutional Democracy, Election Law, The Senate as a Legal Institution, and Contemporary Issues in Constitutional Law, winning a Dean's Scholar Prize in each of the latter two courses. Although Ben also received grades of Pass in seven courses, all but one of those came during his first-year here, after an unusually long break between college and law school.

Based on the very strong papers Ben wrote in my advanced seminar, Defending Constitutional Democracy, and his superlative oral performance during the discussions in that seminar, I'm convinced that he is a person of unusual talent who would perform well in a challenging clerkship. I'm therefore strongly supportive of his application.

Sincerely,

Laurence H. Tribe
Carl M. Loeb University Professor Emeritus

Laurence Tribe - tribe@law.harvard.edu - 617-495-1767

Below is a slightly excerpted version of a memo I wrote addressing possible litigation directed at the Pennsylvania Senate's subpoenas and investigation of alleged irregularities in the 2020 election. I have omitted Section II, which discussed various causes of actions and when and against whom they could be brought; the memo proceeds on the assumption that we would only bring claims under 52 U.S.C. § 10101(b) (usually referred to as "§ 11(b)" of the VRA) against the Senator and Senate Secretary who signed the subpoena and the vendor they hire to conduct the audit. I also omitted the recommendations section. The memo was written in October, 2020; since then, a vendor has been hired and the subpoena has been allowed, but the memo has not been updated.

WRITING SAMPLE

A suit challenging the pending "audit" in Pennsylvania would highlight the danger such audits pose to democracy. However, a suit now would have to overcome standing, ripeness, sovereign immunity, legislative immunity, and abstention, muddying the litigation. These non-merits issues diminish significantly once a third-party vendor is hired.

I. Factual Background[1]

After the 2020 election, all but four counties in Pennsylvania conducted "risk-limiting audits" that confirmed the results of the election; similarly, in May and June the House and Senate published reports confirming the results. After public pressure from former President Trump, on September 15 Pennsylvania Senator Chris Dush, chairman of the Intergovernmental Affairs Committee ("IOC"), held a hearing to authorize subpoenas of voter information and election infrastructure information, describing the investigation as one "into the 2020 general election and 2021 primary election and how the election code is working after the sweeping changes of Act 77 of 2020." However, at the hearing, Dush admitted the investigation's purpose was to "verify the identity of individuals and their place of residence and their eligibility to vote." Dush said the information requested would be reviewed by a third-party vendor he refused to identify. The committee voted to authorize the subpoena on a party line vote.

The subpoena was signed by Dush and Senate Secretary Martin[2] and served on the Secretary of State on September 15, 2021. It requests information on every registered voter in Pennsylvania, including names, addresses, dates of birth, voting history, driver's license numbers, and partial Social Security numbers, as well as election administration information from the Pennsylvania Department of State.

[1] Except where indicated, this information is gathered from the AG's complaint.
[2] Martin is the "is the chief legislative officer of the Senate . . . overseeing numerous financial and administrative functions related to her operation." Office of the Secretary Pennsylvania State Senate, *Secretary & Parliamentarian of the PA Senate*, https://www.secretary.pasen.gov/bio.cfm (accessed Oct. 18, 2021).

WRITING SAMPLE

According to the Pennsylvania statute, the election commission must create a "public information list" of voter information, including "the name, address, date of birth and voting history" of each "registered elector." 25 PA. CONS. STAT. § 1404(a). Any registered voter can request a public information list, but "may not use any information contained in it for purposes unrelated to elections, political activities or law enforcement." *Id.* at § 1404(c). Regulations require any voter who asks for the list affirm in writing they will not use it for "purposes unrelated to elections, political activities or law enforcement," 4 PA. CODE § 183.14 (b)(5), and may not publish it on the internet, *id.* at (k). Finally, voters may not inspect signatures, driver's license numbers, social security numbers, addresses of certain state employees,[3] *id.* at (c)(4), those who have requested confidentiality due to safety concerns, *id.* at (c)(5), and the "Deceased Voters List," *id.* at (c)(6).

The subpoena requested the information by October 1, but the Pennsylvania executive branch refused to comply. On September 17, Senate Democrats sued Corman, Dush, and Martin to quash the subpoena in state court, arguing it violates separation of powers and disclosure law. On September 23, the Pennsylvania Attorney General sued Dush, Corman, and the IOC, arguing the subpoena violates various state laws and constitutional provisions (including by intimidating voters). On October 4, the ACLU of Pennsylvania filed a motion to intervene in the AG's suit, arguing the subpoena violates privacy rights.

The litigation is being heard in the Commonwealth Court and Dush has not tried to hold the Secretary in contempt.

[3] Such as police officers, prosecutors, judges.

II. We can either bring § 11(b) claims against Dush and Martin now in an "early suit" or against Dush, Martin and the vendor in a "late suit"

[Discussion of § 11(b) and the pros and cons of other causes of action are omitted.]

III. Standing and ripeness challenges are surmountable, but not frivolous.

Because the Pennsylvania executive branch[4] has refused to comply with the subpoena and the harms are arguably "generalized" defendants can raise non-frivolous but relatively weak standing challenges to an early suit. Defendants are on firmer ground in raising ripeness challenges to an early suit because state law litigation might moot our litigation. A late suit is on substantially firmer grounds in both cases.

A. The defendant's standing arguments in an early suit are not strong: this is not a pre-enforcement action and subpoenas can be challenged before investigations begin, and in both suits the harm is not generalized.[5]

In an early suit, defendants might argue that this is a "pre-enforcement" action because we are challenging the audit before it has begun. But the legislature has not passed an allegedly unlawful statute which may or may not be enforced. *See, e.g.*, *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979). Instead, the legislature's actions are already intimidating voters. The IOC's subpoena has already been issued, and they have said they *will* give the information to an unknown third party to engage in what is functionally law enforcement activity.

In an early suit, defendants might argue there are too many hypothetical steps for that harm to become real: the state courts must not quash the subpoena, the executive must give them the information, the IOC must find a third-party contractor, etc. *See Clapper v. Amnesty Int'l*,

[4] Some news reports refer to Governor Wolf as "ignoring" the subpoena; my understanding is the subpoena is not issued to *him* at all, but perhaps he has ordered the Secretary of State to ignore it.
[5] Given our organization's familiarity with them, I omit discussion of the doctrines of individual, associational, and organizational standing.

568 U.S. 398, 410 (2013) (rejecting the claimed harm as too attenuated when multiple hypothetical superseding events are required for the harm to occur); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1993) (holding the harm must be "actual or imminent, not conjectural or hypothetical" in the "injury in fact" analysis). But there is no question subpoenas issued by an Attorney General prior to an investigation can be challenged without waiting for the actual investigation to occur. *See, e.g.*, *Matter of Evergreen Ass'n, Inc. v. Schneiderman*, 153 A.D.3d 87, 101–03 (N.Y. App. Div. 2017) (narrowing the scope of a subpoena because of constitutional concerns). The same reasoning applies here. Both "timing" arguments are inapplicable to a late suit, where the subpoena is legal and a vendor has been hired.

But regardless of whether the suit is late or early, defendants might argue that this is a "generalized" grievance because they are requesting information on every voter. Our response would be that certain classes of voters are reasonably more intimidated by this action and that organizational plaintiffs that serve those classes of voter are uniquely burdened.

B. Ripeness challenges are stronger for an early suit, but surmountable; they are inapplicable to a late suit.

The Third Circuit uses a three-factor test to determine ripeness: whether the parties are "sufficiently adversarial," the appellants "genuinely aggrieved," and the issues appropriately "crystallized." *In re Energy Future Holdings Corp*, 949 F.3d 806, 816 (3d Cir. 2020). All three factors are met in either suit, but an early suit would at least allow the defendants to raise colorable claims.

In an early suit, the first factor is met, as we would take "conflicting positions" on the relevant legal issues from the defendants. *Id.* It is not clear how the second factor is distinct from the "injury in fact" analysis discussed above. *See id.* (holding that suffering from mesothelioma

satisfied this factor); *Jie Fang v. ICE*, 935 F.3d 172, 186 (3d Cir. 2019) (holding that being denied lawful status satisfied this factor).

Instead, the analysis would hinge on whether the factual issues were "crystalized"; whether "the facts of the case [are] sufficiently developed to provide the court with enough information on which to decide the matter conclusively." *Id.* Similarly, a Third Circuit panel held that a dispute is not ripe if it "rests upon contingent future events that may not occur as anticipated." *Sherwin-Williams Co. v. County of Delaware*, 968 F.3d 264, 272 (3d Cir. 2020).

In an early suit the defendants will argue the harm is dependent on future contingencies. However, if the harm is giving the information to a private party to conduct a law enforcement action, there are no future factual matters necessary to "decide the matter conclusively." Unlike in cases where the government has announced certain conduct to be unlawful, but not taken any steps to enforce that announcement, the subpoena is part of the "enforcement" challenged. *See Wyatt, Virgin Islands, Inc. v. Virgin Islands*, 385 F.3d 801, 803–04 (3d Cir. 2004).

Furthermore, while the state court litigation *could* render the matter moot,[6] the Third Circuit seems to hold that simultaneous proceedings addressing distinct issues are not sufficient for a defendant to successfully raise a ripeness challenge. *Cf. Jie Fang*, 935 F.3d at 186 (holding that hypothetical parallel administrative proceedings were not grounds to dismiss the case as unripe where they would not decide all the plaintiff's claims, though they might alleviate some of the harms). The possibility that a state court might issue a holding that renders the lawsuit moot is not the same as a claim that relies on the state to take uncertain steps for the harm to occur—instead, the harm is already occurring, and there exists some possibility a state court

[6] Furthermore, the state court could rule narrowly that the subpoena exceeds the authority of the committee, in which case a majority vote in the Senate could fix that procedural defect, or they could hold that this is a violation of state separation of powers, in which case would be moot absent a state constitutional amendment.

might alleviate it. Ripeness concerns would not be applicable to a late suit at all: the investigation would be underway.

IV. State sovereign immunity is not abrogated by § 11(b), but *Ex parte Young* applies.

As we would be suing for injunctive relief against Dush and Martin in their official capacities, they might argue the suit is barred by state sovereign immunity.[7] Arguing that § 11(b) abrogates state sovereign immunity involves complicated arguments about the power it was passed under and would likely fail. However, both Dush and Martin can be enjoined from pursuing the subpoena or sharing information with third parties under *Ex parte Young*, even though there are limits to that doctrine as applied to legislators.

A. Regardless of the power § 11(b) is passed under, it does not "unequivocally" abrogate state sovereign immunity.

Laws passed under the Elections Clause of Article I, § 4 almost certainly cannot abrogate state sovereign immunity, while those passed under § 2 of the Fifteenth Amendment almost certainly can. Whether § 11(b) is an exercise of the Elections Clause or the Fifteenth Amendment is a close case. But even if § 11(b) is a valid exercise of the Fifteenth Amendment, any court looking closely at the matter would find Congress did not unequivocally abrogate state sovereign immunity. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001).

i. Laws passed under the Elections Clause cannot abrogate state sovereign immunity, but laws passed under the Fifteenth Amendment can.

It is reasonably settled that no power in Article I may abrogate state sovereign immunity. The Supreme Court reasoned in *Seminole Tribe v. Florida* that Article I powers were granted

[7] A suit against the private actors would not be barred, and relief would be available.

prior to the Eleventh Amendment and therefore the conception of Article III jurisdiction created (or restored) by the Eleventh Amendment governs causes of action created under Article I powers, barring those suits against states without states' consent. 517 U.S. 44, 65–66 (1996) (holding Article I cannot disturb the "balance between state and federal power achieved by Article III and the Eleventh Amendment."). *Seminole Tribe* only dealt with the Commerce Clauses. *Id.* at 59–73. However, the reasoning has been extended to the power to enforce patents, *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 2199 527 U.S. 627, and copyright law, *Aaron v. Cooper*, 140 S. Ct. 994 (2020). And *Seminole Tribe* overruled the one instance the Court held Congress could abrogate state sovereign immunity under Article I. 517 U.S. at 59–73 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

However, Congress may abrogate state sovereign immunity when acting under the § 5 enforcement power of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."). The Fifteenth Amendment should also allow Congress to abrogate sovereign immunity—just as the Fourteenth Amendment postdated the Eleventh Amendment and gave power to the federal government at the expense of the states, so did the Fifteenth. This is the position of the Sixth Circuit, *Mixon v. State of Ohio*, 193 F.3d 389, 397–99 (6th Cir. 1999), and the Fifth Circuit. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017). The Eleventh Circuit recently followed *Mixon*, but was reversed on mootness grounds. *Alabama State Conference of the NAACP v. Alabama*, 949 F.3d 647, 654–55 (11th Cir. 2020), *judgment vacated as moot*, *Alabama v. Alabama State Conference of NAACP*, 141 S.Ct. 2618 (2021). Unless the Court

reverses *Fitzpatrick*, the reasoning of that case applies and the Fifteenth Amendment must give Congress the power to abrogate sovereign immunity.

ii. Assuming § 11(b) is a valid exercise of the Fifteenth Amendment, it did not unequivocally abrogate state sovereign immunity.

To abrogate state sovereign immunity, (1) Congress must make its intent to abrogate "unequivocal" and (2) exercise a power on which abrogation can be based. *Garrett*, 531 U.S. at 363. While it is not clear what power § 11(b) was passed under, it fails the first prong.

Assuming § 11(b) is a valid exercise of the Enforcement Clause of Fifteenth Amendment,[8] it will be difficult to show that Congress "unequivocally" intended to abrogate state sovereign immunity. Unlike § 11(b), Section 2 of the VRA mentions states and whether that is an "unequivocal" abrogation of sovereign immunity is controversial.[9] Instead, Section 11(b) only covers persons acting under "color of law." The Supreme Court held the reference to "color of law" in § 1983 does not apply to states or state actors acting in their official capacities, a position that would likely be extended to § 11(b). *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65–71 (1989). Our best argument would be to tie § 11(b) to the sections of the VRA that mention states and show they were *all* intended to work against the states. Given the availability of *Ex parte Young*, that is not an argument worth making.

[8] *Contra*, Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, N.Y.U. REV. L. & SOC. CHANGE 173, 209 (2015) (arguing § 11(b) should be upheld as an exercise of the Elections Clause power because it does not require the intimidation to be racially motivated).
[9] *See Alabama State Conference*, 650–54 (holding the reference to "states" in Section 2 fulfills the requirement of a "clear statement" for abrogation); *contra Lewis v. Bentley*, 2:16-CV-690-RDP, 2017 WL 432464, *9–*10 (N.D. Ala. Feb. 1, 2017) (applying a stringent clear statement test to find the same language in Section 2 "ambiguous").

B. These legislators and legislative officials are proper defendants under *Ex parte Young*.

Normally, the lack of abrogation is a non-issue when prospective, injunctive relief is demanded because *Ex parte Young* allows federal laws to be enforced against state officials in their official capacity. However, there is little case law on using *Ex parte Young* against legislators who use non-legislative powers. Recent cases involving legislators that block constituents on social media and older case law shows a path forward and strongly suggests both Dush and Martin can be enjoined.

A claim for injunctive relief under *Ex parte Young* requires the targeted official(s) to have a duty to enforce the law. 209 U.S. 123, 157 (1908). This does not mean the law must specifically require the official to enforce it, but that the official "has some connection with the enforcement of the act." *Id.* Therefore, *Ex parte Young* injunctive relief is not available against state legislators who enact allegedly unconstitutional legislation. *See, e.g.*, *Hall v. Louisiana*, 974 F. Supp. 2d 944, 954 (M.D. La. 2013) ("it cannot be said that . . . that the Legislature has some connection with the enforcement of the 1993 Judicial Election Plan; or that they are specifically charged with the duty to enforce the Plan and are threatening to exercise that duty.").

However, legislators are not immune from injunctive relief. For instance, in *Bond v. Floyd*, the Supreme Court concluded without analysis that it had jurisdiction over a suit concerning the refusal of the Georgia House of Representatives to seat a member. 385 U.S. 116, 131 (1966). After the Second Circuit ruled that it was unconstitutional for Trump to block critics on his Twitter account, *Knight First Amendment Inst. v. Trump*, 928 F.3d 226 (2019), *vacated as moot by Biden v. Knight First Amendment Inst.* 141 S. Ct. 1220 (2020), similar suits were instituted against other politicians. As in *Bond*, most of the Courts hearing cases against

legislators simply assumed injunctive relief was available. *See, e.g.*, Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021). Of the two courts to consider the question, one engaged in a cursory analysis concluding that the operative question was whether the legislator was acting in an official capacity. *Clark v. Kolkhorst*, No. A-19-CV-00198-LY-SH, 2020 WL 6151570, *6–*7 (W.D. Tex. Oct. 20, 2020). The other court to consider the question held that the focus on enforcement was misguided, and that "any act by a state official—as long as it is performed under color of state law—is sufficient." *Attwood v. Clemons*, 818 F. App'x 863, 868 (11th Cir. 2020). Instead, the requirements are merely that the violation by the state official is ongoing, and the relief is prospective. *Id.* at 867–68 (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Maryland*, 525 U.S. 635, 645 (2002)).

Normally, legislators are poor targets because they cannot offer prospective relief—a Court will not order them to repeal legislation. However, the violation here is ongoing and the prospective relief is clear whether the suit is late or early: declaring the subpoena unlawful or ordering the IOC to not share information with a vendor. Furthermore, using the language of "enforcement" from *Ex parte Young*, the officials are enforcing these actions: Dush is enforcing the subpoena by defending it in court and would presumably transfer the records to the vendor himself. The subpoena is signed by Dush and Martin in their official capacities. *Ex parte Young* should apply and state sovereign immunity should not be a bar to relief for early or late suits.

V. The subpoena, sharing the information with a third-party vendor, and conducting an audit are not protected by legislative immunity.

Whereas federal legislative immunity is derived from the Speech and Debate Clause, the Supreme Court has held a roughly coterminous non-constitutional immunity applies via federal common law to state legislators and immunizes them from damages and injunctive relief. *Sup.*

Ct. of Va. v. Consumers Union of U.S., Inc., 446 U.S. 719, 732–33 (1980).[10] Dush and Martin[11] will argue that issuing a subpoena is covered by this immunity. Rather than arguing that § 11(b) abrogates state legislative immunity, [12] our strongest argument for a late or early suit is that the subpoena, sharing the information, and the audit are all non-legislative enforcement actions not covered by legislative immunity. A late suit might raise practical difficulties, but also allow for alternate arguments.

A. The Supreme Court considers using subpoenas for enforcement actions and fishing expeditions to be outside the scope of legislative power.

Generally, the Supreme Court holds that legislative subpoenas and investigations are protected by legislative immunity as legitimate legislative acts. *Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 504–05 (1975). However, subpoenas must concern legitimate legislative activity. *Trump v. Mazars, USA LLP*, 140 S. Ct. 2019, 2031–32 (2020) ("The subpoena must . . . concern a subject on which legislation could be had.") (cleaned up). There is no consistent test, but there are two rough, overlapping areas in which subpoenas are considered non-legislative: if they are functionally an enforcement action or if they constitute a standardless "fishing expedition." *See id.* at 2048 (Alito, J., dissenting) (noting evidence the subpoena of Trump was a de facto "enforcement" action and that the sheer volume requested was disturbing).

[10] Lower courts have occasionally made distinctions between the scope of the two immunities, despite the language in *Consumers Union* that they are identical. *See, e.g.*, Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 333 (E.D. Va. 2015) ("the need to protect legislative independence and the legislative process for state legislators may be somewhat tempered when federal statutory law comes into conflict with federal common law").
[11] In Eastland v. U.S. Serviceman's Fund, the Court held that Congressional legislative counsel was afforded full legislative immunity. 421 U.S. 491, 507 (1975); *cf.* Gravel v. United States, 408 U.S. 606, 616–22 (1973) (holding that legislative aides are also covered by legislative immunity so long as they are participating in legitimate legislative acts). If the act is a legitimate legislative act, Martin is protected by legislative immunity.
[12] Although most of the cases involving legislative immunity concern § 1983, and § 1983 has been interpreted to contain immunities not available in other contexts (for instance, qualified immunity is inapplicable to Title IX claims), courts have generally assumed legislative immunity applies to all causes of action. *See, e.g.*, Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 797 (W.D. Wis. 2020) (holding that all "claims [brought here] against [legislators] are foreclosed by the doctrine of legislative immunity," including ones based on the VRA).

WRITING SAMPLE

Recently, the Supreme Court held that the Congressional power to subpoena did not extend to "law enforcement," a "'general' power to inquire into private affairs and compel disclosures," "to expose for the sake of exposure," or to conduct investigations for "personal aggrandizement of the investigators or to 'punish' those investigated." *Id.* at 2032 (cleaned up) (majority opinion). However, there is no clear test for determining when legislative investigations veer into enforcement. In *Tenney v. Brandhove*, the Court held, "[t]o find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." 341 U.S. 367, 378 (1951) (discussing a state legislature). There is no binding precedent where legislative activity was deemed non-legislative on the grounds it was an enforcement action, nor one where the distinction was even discussed at length. However, motive inquiries are not part of the analysis and "impure" motives cannot render an otherwise legal subpoena illegal. *See e.g.*, *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998); *Eastland*, 421 U.S. at 500; *Watkins v. United States*, 354 U.S. 178, 200 (1957) *Tenney*, 341 U.S. at 377; *but see Mazars*, 140 S. Ct. at 2035 (never mentioning motive inquiries).

Alternately, the Supreme Court has suggested that the aims of legislative subpoenas must be defined with some degree of specificity, and there must be some sort of nexus between the subpoena and the stated aim. Analyzing the "aims" issue, while reviewing a contempt conviction of a witness who refused to identify certain supposed communists after being subpoenaed by the "House Committee on Un-American Activities," the Court in *Watkins* was highly critical of the breadth of the authorization given to the committee by the House, 354 U.S. at 201–02, and the lack of oversight exercised by the House, *id.* at 203–04; *but see Eastland*, 421 U.S. at 507 (holding subpoenas as an investigation of the "administration, operation, and enforcement of the

Internal Security Act of 1950" were sufficiently narrow). Analyzing the "nexus" issue, the *Watkins* Court was skeptical of the nexus between the aim of the hearing (communism in labor organizations) and the questioning because most of the individuals the committee asked the witness to identify had nothing to do with labor organizations. 354 U.S. at 213–14. Similarly, in *Mazars* the Court held that "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose . . . That is *particularly true* when Congress contemplates legislation that raises sensitive constitutional issues." 140 S. Ct. at 2035 (emphasis added). Although *Mazars* dealt with federal separation of powers, the emphasized language shows that it is a general command to analyze whether a subpoena advances a legislative purpose.

B. Under Third Circuit precedent, the investigation is outside the scope of Congressional power, and thus outside the scope of state legislative immunity, and declaring it unlawful will not undermine the purposes of legislative immunity.

In determining if legislative immunity applies to a state official, the Third Circuit determines (1) whether the power exercised is analogous to one granted to Congress and (2) if review of the action would undermine the purposes of legislative immunity, which are ensuring (A) non-interference from other branches and (B) lawmaking without fear of suit. We would argue that the subpoena and the audit are parts of an unlawful enforcement action, the subpoena is overbroad, and in both cases judicial review would not undermine the purposes of legislative immunity. Despite being on firmer legal ground, the overbreadth argument is weaker as a practical matter because the IOC or the legislature can reissue the subpoena under different rules.

i. Legislative Immunity in the Third Circuit[13]

In *Larsen v. Senate of Pa.*, the Third Circuit considered a challenge by a former state supreme court justice to an impeachment proceeding. 152 F.3d 240, 243 (3d Cir. 1998). First, it held that because the U.S. Constitution gives the Senate the power of trying impeachments of judges, the Pennsylvania Senate's parallel power to do so was a legitimate legislative activity under federal common law. *Id.* at 250–52. However, it also held that "[l]egislative immunity must be applied pragmatically, and not by labels . . . we examine whether [relief] could be accorded consistent with the policies underlying legislative immunity." *Id.* at 253. Those policies are "legislative independence" from other branches and to allow legislators to do their job without the worry of lawsuits. *Id.* at 249–50. The panel held that legislative immunity applied because the relief would force "the individual Senators [to] rescind their guilty vote . . . directly interfere[ing] with the role assigned exclusively to the Senators by the Pennsylvania Constitution" and require "extensive discovery . . . into the motives for the Senators' votes" *Id.* at 254. Thus, allowing the suit would force the judiciary to interfere with the legislative branch and prevent effective lawmaking by requiring discovery into their motivations.

ii. This is a non-legislative enforcement action

We could argue this is a "law enforcement" action instigated for "personal aggrandizement of the investigators [and] to 'punish' those investigated." *Mazars*, 140 S. Ct. at 2032 (cleaned up). However, lack of clear precedent is an issue; we would mostly be arguing from first principles.

[13] The Third Circuit has an inapplicable test, for separating "administrative" and "legislative" acts. *See, e.g.*, Ryan v. Burlington County, 889 F.2d 1286, 1290–91 (3d Cir. 1989); Larsen v. Senate of Pa., 152 F.3d 240, 252 (3d Cir. 1998) (when there is no question as to whether the act is "administrative" or legislative, the test is not applicable).

If this is a functional law enforcement action, it is outside the power of the Senate and therefore outside the scope of state legislative immunity in federal court. This investigation's stated goal is to uncover supposed fraud in the 2020 election. Investigating fraud and other election crimes is the province of the executive branch. The legislature can subpoena the executive branch to learn details of investigations or to determine whether it has been investigating crimes, but they cannot instigate those investigations themselves.

Nor would ruling the subpoena or audit unlawful undermine the purposes of legislative immunity. Litigating its lawfulness does not intrude on the independence of the legislature—they do not need to rescind votes as a result. Nor does it interfere with the ability of legislators to pass legislation because the suit would not consider the motives of legislators. Instead, both the sheer volume of the information requested as well as the stated goals of Dush (uncover fraud) so this is a de facto enforcement proceeding. *Cf. Mazars*, 140 S. Ct. at 2048 (Alito, J., dissenting).

However, due to the lack of precedent, we would be relying heavily on *Mazars*, and we would be asking a court to strike out into unknown territory. A court could reasonably hold that subpoenas are legitimate legislative activity and our framing of the subpoena as an investigation is really an inquiry into motive barred by the legislative immunity doctrine.

iii. The investigation is lacks a sufficient nexus with the stated aim of uncovering fraud.

Although we could argue that the subpoena was not validly authorized,[14] that would largely duplicate state court litigation and offer the Senate an easy solution: formally authorize the investigation. Instead, a better argument is that the investigation lacks a sufficient nexus between the stated aim of the investigation and the subpoena issued.

[14] It does not appear the Senate ever voted, as a chamber, to authorize the investigation.

Because subpoenas that lack a sufficient nexus are outside Congressional power, if this subpoena lacks a sufficient nexus it is outside the federal common law's definition of legislative power. The stated goal is investigating Act 77's effect on the 2020 election; the request is giving the private voting information of every registered voter in Pennsylvania to an unknown private company. That may well "lead to ruthless exposure of private lives in order to gather data that is neither desired by the [legislature] nor useful to it." *Watkins*, 354 U.S. at 204. After all, it is not clear why the county audits nor the House and Senate's independent reports were insufficient to determine whether or not there was systemic fraud.

And ruling on these grounds would be even less harmful to the purposes of legislative immunity. Insisting on a nexus between legislative investigations and their stated aim is not interfering with the legislative sphere, nor does it impede their ability to pass laws by requiring invasive discovery. The suit would be agnostic as to the motives or even the purpose of the investigation. But it opens us up to the rejoinder that all Dush needs to do is send a more focused subpoena and legislative immunity will attach. (Or, in a late suit, not send *all* the information to the vendor).

C. Bringing a late suit might make the legislative immunity argument more difficult, but we can try to distinguish legislative immunity as applied to the subpoena from the audit.

In a late suit, a Pennsylvania court will have presumably ruled the subpoena legal under Pennsylvania law. Nothing would technically prevent us from arguing the subpoena and the audit are still unprotected, non-legislative enforcement activity under federal common law at that point. And if we are successful, none of the private parties could raise a legislative immunity either. But a federal court might hesitate to rule that the Pennsylvania judiciary's conception of

legislative power is incompatible with the federal common law conception. In that case, we could try to distinguish the subpoena from the audit, but it will be difficult.

Legislators cannot claim legislative immunity when they share information with private parties for publication by private parties. *Gravel v. United States*, 408 U.S. 606, 625–26 (1972). But private parties can claim legislative immunity when they create reports for legislators if the harm from the report comes from "introducing material at Committee hearings," "referring the report . . . to the Speaker of the House," or voting for publicizing the hearings. *Doe v. McMillan*, 412 U.S. 306, 312 (1973). That is, if the harm comes from publicizing the information as part of legislative hearings, it extends to private parties, but if the harm comes from sharing information with private parties, legislative immunity does not attach at all.

As to the vendor, if it is the act of *reviewing* information that is intimidating, *Doe* is inapplicable because the harms do not come from *publication*.[15] Just as a private actor hired by a legislator could not unlawfully obtain information and then raise a legislative immunity defense if sued, they cannot engage in voter intimidation and claim they are shielded by legislative immunity. A similar theory would apply to state actors: even if the subpoena is a valid legislative act, sharing it with a private party to investigate it for alleged criminal activity is not. However, a court might well balk at the theory that an inter-branch subpoena is lawful, but it is unlawful to *use* the information lawfully collected.

VI. Abstention arguments will not bar an early suit.

Defendants might argue that the parallel state law litigation merits abstention in an early suit. The only two applicable abstention doctrines, *Pullman* abstention and *Colorado River* abstention, are not strong.

[15] Publicizing the information would also be intimidation, but would be protected by legislative immunity if the publication is done on the legislative floor.

Pullman abstention applies when the resolution of the state law issue will dissolve the federal constitutional issue in a case. 312 U.S. 496, 501–02 (1941). That is not applicable here because we would only be suing on federal statutory grounds, not constitutional grounds. *Cf. United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 363–64 (3d Cir. 1986) (holding that preemption claims are not appropriate for *Pullman* abstention); *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PROCEDURE AND PRACTICE, § 4242 (1998) (noting that while some courts in the 1960s and early 70s applied *Pullman* abstention to cases involving federal statutory law, the rule is limited to constitutional cases).

Colorado River abstention applies to parallel federal and state litigation where there are "exceptional circumstances" that justify a stay of the case. Whether the cases are "parallel" is a threshold determination in the Third Circuit, and depends on whether there is "substantial similarity in issues and parties." *Kelly v. Maxum Specialty Ins. Grp.*, 868 F.3d 274, 287 (3d Cir. 2017) (collecting cases). Cases can be quite close and not parallel: the Third Circuit has held that an insurance company seeking a federal declaratory judgment on its obligation to defend and indemnify those it insures is not parallel with state tort litigation against the same insurance company on the basis of the same incident. *Id.* at 287 (collecting cases). Here, they are not parallel because the parties would be different, and we would not be litigating any state law claims (legislative immunity is a question of federal common law, not state law. However, there are no published cases where that was determinative; instead, the Third Circuit always has gone on to find the "extraordinary circumstances" factors also do not merit abstention.

The Supreme Court has announced a six-factor test to determine if exceptional circumstances exist, "with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S 1, 16 (1983). The first factor

is inapplicable—whether either case is an *in rem action*. The second factor, whether a federal forum is inconvenient, is also inapplicable because there is no inconvenience. The third factor, the "avoidance of piecemeal litigation," is not a general command to avoid piecemeal litigation, but "an inquiry into whether avoiding piecemeal litigation is a priority contemplated by the statute, regulation, or other authority at issue." *Nationwide Mutual Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 308 (3d Cir. 2009). Nothing in § 11(b) contemplates a policy one way or another.

When considering the fourth factor, order of litigation, the Third Circuit focuses on "[t]he comparative progress made in the state cases" on the common issues. *Id.* at 809. If the court decided there were common legal issues, there might be some "duplicative judicial effort" in the state and federal proceedings. *Id.* The fifth factor, whether a federal rule controls the merits, weighs against abstention because the merits of the voter intimidation suit are entirely a question of federal law, as is the legislative immunity analysis, to the extent it can be considered part of the "merits." Finally, if there is concurrent jurisdiction the Third Circuit finds the sixth factor of whether the state court can protect a party's rights to carry "little weight." *Id.* at 308. This factor seems to be a one-way ratchet that is either inapplicable or weighs against abstention. *See Ryan v. Johnson*, 115 F.3d 193, 200 (3d Cir. 1997). Because the VRA does not give the federal courts exclusive jurisdiction, this factor would be inapplicable. Because "the balance [is] heavily weighted in favor of the exercise of jurisdiction," *Cone*, 460 U.S. at 23, and only one factor (four) *could* weigh in favor of abstention, a *Colorado River* argument will fail.

That does not mean an early suit would be heard quickly. The state law litigation could render the matter moot, and a TRO is not likely, given that irreparable harm will be difficult to

show where the executive branch is refusing to comply with the subpoena. A late suit would raise no formal or informal abstention issues.

VII. Recommendations

[omitted]

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WRITING SAMPLE

The writing sample below is an excerpt from a larger piece about an underexplored change in First Amendment doctrine: the impact of *McCullen* and, to a lesser extent, *Packingham*, on Court of Appeals treatments of content-neutral intermediate scrutiny. Omitted is a discussion of the theoretical underpinnings of intermediate scrutiny and Supreme Court treatment of both content-neutral intermediate scrutiny and the commercial speech doctrine, in which I conclude that the commercial speech test is stricter than content-neutral intermediate scrutiny. Part III, included below, is a survey of every published Circuit Court opinion after *Reed* to apply content-neutral intermediate scrutiny. I conclude that while most Circuits correctly cabin *McCullen* as an exceptional case, there is an unfortunate trend of reading it as elevating intermediate scrutiny to something approaching either the heightened standard applied in contemporary *Central Hudson* analysis or even strict scrutiny.

Intermediate Scrutiny Post-*McCullen*

There has been no shortage of ink spilled on the "weaponization" or "Lochnerization" of the First Amendment[1] and the related "black hole" of Free Speech jurisprudence.[2] While these criticisms are well taken, contemporary policymakers will have to work within this regime—barring radical court reform. In that vein, some commentators, especially those proposing regulations of online spaces, have offered content-neutral regulations that might not trigger strict scrutiny, but would be reviewed under the intermediate scrutiny reserved for "time, place, and manner" regulations[3]; what I will call "content-neutral intermediate scrutiny." However, even this more deferential scrutiny might present a significant roadblock to regulation.

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[1] *See e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) ("[The majority opinion] weaponiz[es] the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."); Nat'l Inst. Of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, (2018) (Breyer, J., dissenting) ("Precedent does not require a test such as the majority's . . . . Ever since this Court departed from the approach it set forth in *Lochner v. NewYork*, ordinary economic and social legislation has been thought to raise little constitutional concern.") (citations omitted); Sorrell v. IMS Health Inc., 564 U.S. 552, 602–03 (2011) (Breyer, J., dissenting) ("At worst [the majority opinion] reawakens *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue."); *see also* Jedidiah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161 (2018). Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, Columbia L. Rev. Forum (2018) https://columbialawreview.org/content/the-lochnerized-first-amendment-and-the-fda-toward-a-more-democratic-political-economy/; Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (2016); Robert Post and Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. FORUM 165 (2015); *but see* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 339 (2017) ("[P]eople anticipate serious risks from speech, and that those risks rarely materialize. Countervailing benefits, by contrast, are routinely discounted.").

[2] *See e.g.*, Mary Anne Franks, *The Free Speech Black Hole: Can The Internet Escape the Gravitational Pull of the First Amendment?*, KNIGHT FIRST AMENDMENT INSTITUTE: FREE SPEECH FUTURES (August 21, 2019) https://knightcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment; Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1788–90 (2004) (discussing the "magnetism" of the First Amendment).

[3] *See e.g.*, Kyle Langvardt, *Platform Speech Governance and the First Amendment: A User-Centered Approach*, THE DIGITAL SOCIAL CONTRACT: A LAWFARE PAPER SERIES (November 2020) (arguing that friction-increasing regulations should be analyzed under the intermediate scrutiny standard announced in Ward v. Rock Against Racism, 491 U.S. 781 (1989)) https://assets.documentcloud.org/documents/20420835/langvardt-dsc-final-2.pdf; Ellen P. Goodman, Digital Information Fidelity and Friction, KNIGHT FIRST AMENDMENT INSTITUTE: THE TECH GIANTS, MONOPOLY POWER, AND PUBLIC DISCOURSE (February 26, 2020) (arguing that content-neutral regulations are likely the only ones to survive under the current jurisprudence) https://knightcolumbia.org/content/digital-fidelity-and-friction; Kyle Langvardt, *A New Deal For The Online Public Sphere*, 26 GEO. MASON L. REV. 341, 390–93 (2018) (arguing that regulations of social media companies should not be analyzed under strict scrutiny); Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO L.J. 497, 541 (2015) (arguing that the commercial speech jurisprudence is too strict and something like intermediate scrutiny should be used instead);

The general view of content-neutral intermediate scrutiny is that it is little more than a proportionality test,[4] designed only to catch the most egregious attempts to censor speech.[5] However, a close analysis of recent Court of Appeals rulings shows that, at least in some circuits, content-neutral intermediate scrutiny has become more rule-like and less deferential. This change can be traced to two primary sources: a misreading of the Supreme Court's decision in *McCullen v. Coakley*[6] and a failure to separate content-neutral intermediate scrutiny from commercial speech intermediate scrutiny. This is especially concerning as circuit courts have entertained less burdensome "modes" of regulation as less burdensome alternatives in commercial speech cases, drawing on insights from behavioral economics and psychology (for instance, considering an "opt out" less burdensome than an "opt in." Especially in the online context, saturated with services, this could make drafting constitutional laws nearly impossible.

[. . .]

III. Intermediate Scrutiny in the Circuit Courts

Although I believe a careful analysis of the content-neutral intermediate scrutiny cases reveals a coherent doctrine from *Ward* to *McCullen*, the precedential value of the earlier content-neutral cases is uncertain. The Supreme Court has not engaged in a straightforward application of the tailoring prong of content-neutral intermediate scrutiny in the thirty years since *Ward*.[7]

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b*ut see* Kyle Lagvardt & Alan Z. Rozenshtein, *Sen. Hawley's Bid to 'Disrupt' Big Tech*, LAWFARE (September 4, 2019) https://www.lawfareblog.com/sen-hawleys-bid-disrupt-big-tech ("[D]oes the First Amendment really require the government to jump through tiers-of-scrutiny hoops any time it wants to regulate the largest and most powerful companies in the world?").

[4] *See e.g.*, David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 400 (2015) (arguing that intermediate scrutiny is a transparent balancing test).

[5] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 454–55 (1996) (arguing that if the government cannot defend a law under intermediate scrutiny's tailoring requirement's, it probably has censorial ulterior motives); *cf* McCullen v. Coakley, 573 U.S. 464, 486 (2014) ("The government may attempt to suppress speech . . . for mere convenience.").

[6] 573 U.S. 464 (2014).

[7] Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989). A minority of the court recently applied the standard, but split on its application. *See* Barr v. American Ass'n of Political Consultants 140 S. Ct. 2335, 2357 (2020) (Sotomayor, J., concurring in the judgment) (arguing that the exception to the general ban on robo-calls is

Instead, we have *Pap's A.M.*, a plurality opinion dealing with the controversial "secondary effects" doctrine,[8] *Turner I* and *Turner II*, contested and complicated opinions that arguably interact with the "broadcasting" exception,[9] a string of arguably *sui generis* cases on protests outside abortion clinics that culminate with *McCullen*,[10] and, most recently, the soaring prose of *Packingham*—from which it is difficult to extract anything, or rather, it is too *easy* to extract anything.[11] However, as discussed above, the Court has no shortage of commercial speech cases[12] or commercial speech-adjacent cases[13] in recent years.

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unconstitutional even under intermediate scrutiny because it was under-inclusive and there were "far less restrictive means to further [the government's] interest"); *contra id.* at 2362–63 (Breyer, J., concurring in the judgment in part and dissenting in part) (arguing that the law merits intermediate scrutiny, but that it passes that standard given that it is narrowly tailored and does no harm to the development or transmission of ideas).

[8] *See e.g.*, Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis after* Reed v. Town of Gilbert, 57 SANTA CLARA L. REV. 385, 389 n. 21 (2017) (collecting commentary); *see also*, City of Los Angeles v. Alameda Books, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) (These ordinances are content based, and we should call them so."); Flanigan's Enterprises v. Sandy Springs, 703 Fed. Appx. 929, 935 (11th Cir. 2017) ("The secondary-effects doctrine allows a content-based, adult-entertainment-related law to be subjected to less than strict scrutiny."),

[9] Red Lion Broadcasting v. FCC, 395 U.S. 367, 386–90 (1969) (noting the differences between broadcasting and other mediums and holding that those differences are salient for First Amendment analysis).

[10] *See e.g.*, Hill v. Colorado, 530 U.S. 703, 707–08 (2000) (upholding a Colorado statute that makes it unlawful to "prohibits speakers from approaching unwilling listeners" outside any medical facilities"); Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 361 (1997) (upholding another injunction creating "fixed buffer zone[s]" outside abortion clinics limiting protests, but ruling "floating buffer zone[s] unconstitutional); Madsen v. Women's Health Center, 512 U.S. 753, 757 (1994) (upholding an injunction creating a "36-foot buffer zone on a public street from which demonstrators are excluded" from abortion clinics).

[11] *See e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730, at 1737 (Alito, J., concurring in the judgment) (arguing that the majority's analysis is "undisciplined" and "unable to resist musings" that will confuse its impact on precedent); Leading Case, *Packingham v. North Carolina*, 131 Harv. L. Rev. 233, 241–42 (2017) (arguing the dicta will be seized on by lower courts); *but see* Prager Univ. v. Google LLC, 951 F.3d 991, 996, n. 2 (9th Cir. 2020) (rejecting the argument that *Packingham* creates public forums on the internet in the absence of state action).

[12] *See e.g.*, Lorillard Tobacco v. Reilly, 533 U.S. 525, 554–55 (2001) (holding the commercial speech test from *Central Hudson* applicable to the laws in question); Thompson v. Western States Medical Center, 535 U.S. 357, 367–68 (2002) (holding the commercial speech test from *Central Hudson* applicable to the laws in question); s*ee also*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249–50 (2010) (holding *Central Hudson* is inapplicable and applying the more deferential standard of *Zauderer* to the disclosure requirements in question).

[13] *See e.g.*, Janus v. AFSCME, 138 S. Ct. 2448, 2464–65 (2018) (rejecting the applicability of the commercial speech doctrine to "compelled subsidies"); NIFLA v. Becerra, 138 S. Ct. 2361, 2371–72 (2018) (rejecting the "professional speech doctrine" and throwing the scope of *Zauderer* into question by rejecting its applicability to disclosure requirements in a commercial context); *see also* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) (holding that the law in question regulates speech, and remanding to decide whether *Zauderer*, *Central Hudson*, or more exacting scrutiny was appropriate).

Perhaps because of this lack of guidance, Circuit Courts have split sharply, both internally and with each other, in applying content-neutral intermediate scrutiny. I have largely limited the analysis to published circuit court cases that postdate *McCullen* and *Reed*, given the former's possible effects on content-neutral intermediate scrutiny doctrine and the latter's effects on whether those cases should have been interpreted under that standard at all. I have also not considered cases that were overturned on any grounds.

First, I discuss "Frankenstein" cases that, perhaps picking up on outdated dicta,[14] apply contradictory precedents to content-neutral intermediate scrutiny, almost universally leading to a higher level of scrutiny in the narrow-tailoring analysis.[15] Second, I discuss circuits that over-interpret *McCullen* to increase the strictness of content-neutral intermediate scrutiny to something like the commercial speech test by introducing strict rules into the narrow tailoring analysis. Third, I discuss a worrying trend of invoking insights from behavioral psychology in applying narrow tailoring that could exacerbate the deregulatory effects of the doctrinal innovations in the "Frankenstein" and "*McCullen*" circuits. Finally, I end with some good news: a number of circuits have stuck to the deferential, proportionality test announced in *Ward* while incorporating *McCullen* as an exceptional case. Unfortunately, many circuits have continued to apply *Ward* without incorporating the holding of *McCullen*, making them vulnerable to deregulatory-minded litigators.

A. "Frankenstein" Tests

[14] *See e.g.*, United States v. Edge Broadcasting, 509 U.S. 418, 430 (1993) (holding that "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context"). *Edge* has never been overruled, and it merely holds that they are "very similar," not identical, but recent commercial speech cases should caution against putting undue weight on this dicta's relevance.

[15] *See infra* Section II (discussing content neutral intermediate scrutiny as essentially a three-part test: whether the interest asserted is substantial, whether government can show the interest is "directly advanced," and whether the regulation is "narrowly tailored'—usually a rough proportionality test).

Some circuits have invoked commercial speech precedents in applying content-neutral intermediate scrutiny. In doing so, they set the stage for a "Lochner-ized" First Amendment beyond the current boundaries of content-based or even commercial speech regulations.

For instance, in *Edwards v. District of Columbia*[16] the D.C. Circuit purported to apply a mix of *O'Brien* and *Heffron*[17] to a licensing scheme required of all tour guides in Washington, D.C.[18] Finding an interest in preventing fraud substantial, the D.C. Circuit holds that the "regulations must directly advance [the government's] asserted interests."[19]As discussed above, this is a normal step in content-neutral intermediate scrutiny, but the D.C. Circuit cites *United States v. Alvarez*[20] to support this prong, which arguably applied strict scrutiny[21] but definitely something less deferential than the scrutiny in *Ward*.[22] The *Edwards* court then holds that some evidence is required—that "mere speculation or conjecture" is insufficient.[23] Again, this is not out of place in content-neutral intermediate scrutiny given *Turner I*, [24] but the court cites *Edenfield* and *Lorillard Tobacco*—both Supreme Court cases applying *Central Hudson*. The *Edwards* court notes that the only evidence in the record that unlicensed tour guides are a problem is a nearly century-old newspaper article, and therefore this prong is not met.[25] At this

[16] 755 F.3d 996, 1001–02 (D.C. Cir. 2014).
[17] A mixture I actually endorse, *see infra* Section II. For a criticism of this case on the assumption that it is an application of the commercial speech doctrine, *see* Post & Shanor, *supra* note 1.
[18] *Edwards*, 755 F.3d at 998.
[19] *Id.* at 1003.
[20] 567 U.S. 709 (2012).
[21] *Id.* at 730–32 (Breyer, J., concurring in the judgment) (arguing that the majority applied "strict scrutiny" and that "intermediate scrutiny" is more appropriate).
[22] *Id.* at 724 (Kennedy, J., plurality opinion) (applying "exacting scrutiny" to content-based restrictions). Confusingly, Justice Breyer's concurrence in the judgment in that case refers to *Turner I* as an example of intermediate scrutiny, *id.* at 731 (Breyer, J., concurring in the judgment) (citing Turner Broadcasting System v. FCC, 512 U.S. 622, 641-52 (1994), while Justice Kennedy refers to *Turner I* as an example of whatever scrutiny he applies in *Alvarez*. 567 U.S. at 724 (Kennedy, J., plurality opinion) (citing *Turner I*, 512 U.S. at 642). While this raises the possibility that there exists an "exacting" scrutiny that lies between intermediate and strict scrutiny—which might explain the difference between *Turner I* and *II* and *Ward* and *Pap's A.M.*—my analysis proceeds on the assumption that *Turner I* and *II* would govern most cases.
[23] *Edwards*, 755 F.3d at 1003.
[24] 512 U.S. 662, 667 (1994) (Kennedy, J., plurality opinion).
[25] *Edwards*, 755 F.3d at 1003–04.

stage, the mixing of precedent probably does not affect the outcome, but it is important to note that the court is mixing and matching standards from all across First Amendment jurisprudence.

When applying the less burdensome alternative prong, the difference between commercial speech and content-neutral intermediate scrutiny is stark. The command in *Ward* was that the government was *not* required to come up with a less restrictive alternative and barred court-led inquiries into less burdensome alternatives [26] The *Edwards* court cites *Ward*, but concludes that what it means is that the Court *must* ask "whether it is possible substantially to achieve the Government's objective in less burdensome ways."[27] Even *Turner II* rejected alternatives that might have been less burdensome insofar as they did not further the interest as well as the chosen requirement. Nonetheless, the *Edwards* court summarily concludes that the record does not contain evidence that shows alternatives like punishing fraud, requiring tour guides carry maps, or a voluntary certification program would not be as or more effective than the challenged regulation, and therefore the licensing requirement is unconstitutional.[28] As Shanor and Post note, without citing *Central Hudson*'s fourth prong the court functionally applies it, placing the burden on the government to prove why less burdensome alternatives, developed by the Court, were not as effective.[29] That burden-shifting, as discussed above, is the crucial difference between content-neutral intermediate scrutiny and the application of *Central Hudson*. In the former the government must meet the burden of showing it meets the rough proportionality requirement of narrow tailoring, but once it does so the burden functionally shifts to the plaintiff if they try to show less-burdensome alternatives are just as effective.

[26] Ward v. Rock Against Racism, 491 U.S. 781, 797–800 (1989).
[27] *Edwards*, 755 F.3d at 1009 (citing *Alvarez*, 567 U.S. at 737 (Breyer, J., concurring in the judgment)).
[28] *Edwards*, 755 F.3d at 1009.
[29] Shanor & Post, *supra* note 1, at 175. Shanor & Post argue that this is obviously content-based, *id.*, and while their argument is compelling, it is not important to my argument: they are operating under the assumption this is a commercial speech case, *id.* at and are concerned about the heightened scrutiny of those cases. I am concerned about the effects on content-neutral intermediate scrutiny given the mixing and matching of different doctrines.

Edwards is, so far, an outlier.[30] Although there are other cases where Circuit Courts have noted that the commercial speech and content-neutral tests are identical, they are either doing the reverse of *Edwards* and importing content-neutral precedent into commercial cases,[31] or suggesting in dicta that the tests are indistinguishable.[32] The latter is still concerning, because it gives anti-regulatory challengers an opening to cite commercial speech precedent to raise the level of scrutiny in content-neutral cases—especially in the Tenth Circuit, which, as discussed below, has already adopted an overly strict interpretation of *McCullen* that has heightened its application of content-neutral intermediate scrutiny.

B. Over-interpreting *McCullen*

Three Circuits have over-interpreted *McCullen* as fundamentally re-shaping the content-neutral intermediate scrutiny test, creating a new test that replaces deferential proportionality analysis with a strict, rule-like regime with enormous potential as a deregulatory tool. The analysis below will focus on that change, given that even in these circuits the analysis of the interest and the requirement the regulation "advance" the interest is unchanged.

The Fourth Circuit has been the most aggressive in reading *McCullen* to rework content-neutral intermediate scrutiny. In *Reynolds v. Middleton*[33] the court examined an anti-panhandling statute.[34] In examining the first two prongs of the analysis, the court correctly read *McCullen* as confirming that establishing a substantial interest and that the regulation advances that interest

[30] *But see* Wollschlaeger v. Governor, 848 F.3d 1293, 1311–13 (11th Cir. 2017) (applying a strange hybrid scrutiny that invokes Sorrell v. IMS, 564 U.S. 552 (2011), arguably a strict scrutiny case, Edenfield v. Fane, 507 U.S. 761 (1993), a case applying *Central Hudson*, and Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622 (1994) (Kennedy, J., plurality opinion), a content-neutral intermediate scrutiny case).
[31] *See e.g.*, King v. Governor of New Jersey, 767 F.3d 216, 238 (3rd Cir. 2014) (citing *Turner I*, 512 U.S. at 664).
[32] *See e.g.*, McCraw v. Oklahoma City, 973 F.3d 1057, 1071, n. 9 (10th Cir. 2020) (holding that it does not need to decide whether this is a commercial speech regulation because the tests are "essentially identical"); Stardust, 3007 LLC v. Brookhaven, 899 F.3d 1164, 173, n. 6 (11th Cir. 2018) (holding that the commercial speech analysis and content-neutral intermediate scrutiny are more or less identical).
[33] 779 F.3d 222 (4th Cir. 2015).
[34] *Id.* at 225.

present a relatively low bar for the state.[35] However, they read the remainder of the case as establishing the proportionality test has been replaced with a rule that the government must "present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary."[36] "Actual evidence" is not necessarily a strict standard, but in applying it the court held that although the law furthers a substantial interest,[37] it fails narrow tailoring because it bans panhandling in *all* roads rather than in the places where evidence shows it would be most dangerous.[38] And the court holds that the burden is on the state to show it "tried to *use* the available alternatives to address its safety concerns."[39] However, the court did at least reference the importance of proportionality,[40] even if its approach was more rule-like.

The Fourth Circuit largely followed this approach in a more recent case, *Billups v. City of Charleston*,[41] striking down a tour guide licensing scheme in Charleston. Importantly, the court begins not by declaring the statute content-neutral, but by dismissing the inquiry altogether given the law's inability to pass content-neutral intermediate scrutiny.[42] As discussed above, many commentators have discussed the internal incoherence of *Reed*[43]; that incoherence may be largely avoided if courts can apply something that approaches strict scrutiny without ever having

[35] *Id.* at 228 ("the existence of a governmental interest may be established by reference to case law . . . objective evidence is not always required to show that a speech restriction furthers the government's interests") (citing McCullen v. Coakley, 573 U.S. 464, 486–87 (2014)).
[36] *Reynolds*, F.3d at 229.
[37] *Id.* at 229–30.
[38] *Id.* at 231.
[39] *Id.* at 232.
[40] *Id.* at 230 (citing Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 165 (2002)).
[41] 961 F.3d 673 (4th Cir. 2020), *en banc rehearing denied*, 2020 U.S. App. LEXIS 22408 (4th Cir. 2020).
[42] *Id.* at 684–85.
[43] Dan V. Kozlowski and Derigan Silver, *Measuring* Reed's *Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After* Reed v. Town of Gilbert, 24 COMM. L. & POL'Y 191, 213–15 (2019) (collecting commentary); *see also*, Reed v. Town of Gilbert, 576 U.S. 155, 181, n. 6 (2015) (Kagan, J., concurring in the judgment) (arguing that Justice Alito's concurrence misreads the breadth of the opinion, which would subject a regulation on "signs advertising a one-time event" to strict scrutiny).

to invoke *Reed*. In its application, the court holds that *McCullen* requires the government to show "it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest."[44] Again, the proportionality test of *Ward* has been replaced with a rule-like structure very similar to the fourth prong of *Central Hudson*. Furthermore, in this analysis, "post-hoc justification[s]" do not suffice.[45] Because the court ultimately disagrees with the justifications offered by the state[46] the holding is not clear, but it seems to suggest that even a *convincing* post-hoc justification would fail this test. And crucially, while the first two alternatives raised by the plaintiffs here are the enforcement of existing laws,[47] the third alternative is simply a different regulatory regime that other cities use.[48] Thus, while the burden might be on the plaintiff to generate alternatives, once they do the state must apparently have considered those alternatives before they were raised. A more charitable reading would be that plaintiff-proposed alternatives will be considered if they were "obvious,"[49] but that is not clear from the holding. Notably, while the decision limits itself to *McCullen* and other content-neutral cases, it approvingly cites *Edwards* in holding the law unconstitutional.[50]

The Seventh Circuit has also insisted that *McCullen* fundamentally changed the narrow tailoring requirement in content-neutral intermediate scrutiny.[51] However, because the Supreme Court did not explicitly overrule *Hill v. Colorado*[52] when announcing *McCullen*, and because the

[44] *Billups*, 961 F.3d at 688. Those alternatives probably must be "readily available," but the court does not make this clear.
[45] *Id.* at 690.
[46] *Id.* at 688–90.
[47] *Id.* at 688–89.
[48] *Id.* at 689–90 (describing a program of voluntary tour guide certification).
[49] *See e.g.*, U.S. West v. FCC, 182 F.3d 1224, 1238, n.11 (10th Cir. 1999) (holding that *Central Hudson*'s fourth prong is not a "least restrictive means test" but that "obvious and substantially less restrictive means" can be grounds for invalidating a law); *cf. Western States Medical Center*, 535 U.S. at 371 ("In previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interest in a manner that does not restrict speech, or that restricts less speech, the Government must do so).
[50] *Billups*, 961 F.3d at 690 (citing Edwards v. District of Columbia, 755 F.3d 996, 1009 (D.C. Cir. 2014).
[51] Price v. City of Chicago, 915 F.3d 1107, 1115–16 (7th Cir. 2019), *cert denied*, 141 S. Ct. 185 (2020).
[52] Hill v. Colorado, 530 U.S. 703 (2000).

ordinance the court was reviewing was functionally identical to the ordinance in *Hill*, the Seventh Circuit concluded it could not rule the ordinance unconstitutional—though it asked the Supreme Court to weigh in and make the import of *McCullen* clear.[53] It seems likely the Seventh Circuit would apply stricter scrutiny to cases not directly controlled by Supreme Court precedent.

Similarly, the Tenth Circuit has incorporated *McCullen*, though exactly how it is incorporated is unclear. In *McCraw v. City of Oklahoma City*,[54] the court overturned a ban on "standing, sitting, or staying on any portion of a median."[55] The court held that the city had failed to show the legitimate interest in public safety was advanced at all by the law given that they had failed to show any harms.[56] Alternately, the court held that "the burden articulated in *McCullen*" is that the city must "consider" alternatives, and that consideration cannot consist of unsupported evidence.[57] The court relies chiefly on alternatives offered by the plaintiffs, which is less burdensome than the generation of alternatives by the court in *McCullen*.[58] However, the Court concludes by quoting the assertion in *Reynolds* that *McCullen* actually requires a city to *try* less restrictive alternatives,[59] again seeming to shift a rule-like burden to the state.

The problem is not that the laws struck down in these cases were sound judgments of public policy; the median bans and anti-panhandling statutes are regressive and cruel and might fail even a more deferential standard of review. Tour guide licensing regulations are at best silly and at worst rent-seeking. The problem is that these rulings change the content-neutral intermediate scrutiny test from a deferential, proportionality test that implicitly follows the post-*Lochner* consensus that the Court does not second-guess the judgments of the legislative and

[53] *Price*, 915 F.3d at 1118–19. Which it refused, *infra* note 51.
[54] 973 F.3d 1057 (10th Cir. 2020)
[55] *Id.* at 1062.
[56] *Id.* at 1071–73.
[57] *Id.* at 1075.
[58] *Id.* at 1075–76.
[59] *Id.* at 1076 (citing Reynolds v. Middleton, 779 F.3d 222, 231 (4th Cir. 2015).

executive branches in creating and enforcing economic and health and safety regulations[60] to a strict, rule-like test: did you give adequate consideration to less-restrictive alternatives? Can you prove they are not as efficient in advancing the interest justifying the law? Given parallel developments, this rule-like structure is even more worrying.

C. Behavioral Psychology and Commercial Speech In the Circuits

In the commercial speech context courts have used insights from behavioral psychology to hold that versions of the same substantive regulation can be a less restrictive alternative; this is a potentially boundless principle, especially in regulations of services. While its deregulatory potential is concerning in the commercial speech context, it is even more worrying that "Frankenstein" or "*McCullen*" Circuits might import this methodology when applying content-neutral intermediate scrutiny.

Anyone who provides products or services[61] must make design choices.[62] The state generally may regulate those design choices for the benefit of its citizens.[63] We can imagine a spectrum of regulations that limit the choices of providers of private services from most to least burdensome. First are regulations that mandate an outcome, such as simply banning some design feature.[64] Second, there could be a default: a design feature is "turned off" on standard settings, but a user could "opt-in" and turn it on.[65] Third, regulations may require the regulated entity give

[60] *See e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).
[61] The analysis below is more salient for providers of services, like Internet Service Providers, or social media or streaming services, or even physical service providers like hospitals. It technically applies to products—one could imagine a default rule that all guitars must be sold with an extra pack of strings unless customers opt-out—but it is the continued interaction between user and service-provider that makes them more salient in those contexts.
[62] THALER & SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS, 9–11 (2009).
[63] *See e.g.*, (2020) N.Y. Sess. Laws Ch. 267 (S. 1475-A) (McKinney's) (regulating "auto-renewal" services to ensure that consumers understand they are being charged on a regular basis and that they are able to easily cancel the service).
[64] *See e.g.*, S. 2134, 116th Cong. § 3 (1–3) (banning "infinite scroll," "Elimination of Natural Stopping Points," and "Autoplay" on social media platforms).
[65] This was the structure of both privacy requirements promulgated by the FCC below as well as a recent privacy regulation put forth by Maine. ACA Connects v. Frey, 2020 U.S. Dist. LEXIS 118293, *3–*4 (D. Me. 2020).

its users a choice before accessing the service (forced choosing).[66] Fourth, regulations may require the regulated entity to give its users an option and "opt-out" (forced option): the design feature is allowed by the government by default, but users can "turn it off." Finally, the regulator might opt for some educative alternative, like a disclosure rule[67] or a "boost."[68] From a policymaker's perspective the question is which mode is most effective, but when the regulation burdens "speech," these distinctions take on a constitutional dimension.

The two cases that provide the clearest examples analyzing these different modes of regulation are circuit cases a decade apart, *National Cable & Telecomms Association v. FCC*[69] and *U.S. West v. FCC*.[70] Both cases analyzed a near-identical regulation that created a default rule that telecommunications companies could not share "customer proprietary network information" (CPNI) absent an "opt-in" by consumers.[71] The D.C. Circuit in *National Cable* merely required under the fourth prong of *Central Hudson* that "the regulation be proportionate to the interests sought to be advanced" and noted that it was acceptable for the FCC to "presume that consumers do not want their information shared," and downplayed the difference between opt-in and opt-outs.[72] Indeed, the court seemed to be doing the reverse of *Edwards*: instead of importing a rule-like less-burdensome alternative test into content-neutral analysis, it imported the proportionality test into commercial speech analysis.[73] Despite being the more recent case,

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[66] *See e.g.*, THALER & SUNSTEIN, *supra* note 62, at 88.
[67] Given the expansion of the compelled speech doctrine, *see infra* Section I. A., it is not clear this is actually a less-restrictive option, at least in applying the First Amendment.
[68] *See generally* Ralph Hertwig, *When to consider boosting: some rules for policy-makers*, 1 BEHAV. PUB. POL'Y 143 (2017) (boosting is distinct from disclosures in that it educates consumers about *how* to make choices, for example by explaining how to read statistics, rather than merely them information about the choices).
[69] 555 F.3d 996 (D.C. Cir. 2009).
[70] 182 F.3d 1224 (10th Cir. 1999).
[71] *National Cable*, 555 F.3d at 999; *U.S. West*, 182 F.3d at 1299.
[72] 555 F.3d at 1002.
[73] *Cf.* United States v. Edge Broadcasting, 509 U.S. 418, 429 (1993) (holding that the fourth prong of *Central Hudson* is not stricter than strict scrutiny, intermediate scrutiny applied to "time, place, or manner restrictions," and merely "require[s] a fit between the restriction and the government interest that is not necessarily perfect, but

given the overall direction of speech jurisprudence the Tenth Circuit decision (which was denied certiorari) seems doctrinally correct.

The Tenth Circuit held in *U.S. West* that, in addition to the deficiencies in the other prongs of the test,[74] the privacy regulation failed the fourth prong of *Central Hudson* because the FCC could have imposed an "opt-out" rule instead of an "opt-in," which would have been "substantially" less burdensome on speech.[75] Thus, the state had the burden of showing the opt-out was less effective than the opt-in at advancing consumer preference.[76] The court held that a survey showing that 33% of consumers refused approval to share CPNI, 28% granted it, and 39% "hung up or asked not to be called again" was inconclusive because the 39% could not be counted as those who would refuse,[77] and even if a majority did want their information kept private, such a survey would fail "the careful calculation of costs and benefits that our commercial speech jurisprudence requires."[78]

But it is not clear the FCC could calculate those costs to the standard the Tenth Circuit required. Imagine an A-B trial in which some customers are given an opt-in rule and some given an opt-out rule[79]; what results would show that an opt-in rule better protects customers' privacy choices? Would the collection rates under the opt-in system have to be identical to the survey results of customers' privacy preferences?[80] That is, would protecting too many customers'

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reasonable"). This is not the test applied in *Central Hudson*, *Lorillard*, or *Thompson*, but it has never been formally overruled.

[74] *Id.* at 1234–35.

[75] *Id.* at 1238–39.

[76] *Id.*

[77] *Id.* at 1239.

[78] *Id.*

[79] Which would, itself, presumably burden the speech rights of the telecommunications companies and be subject to a similar analysis.

[80] That is, under opt-in the percentage who opt-in is identical to the percentage surveyed who wanted their information shared, assuming there was not a significant percentage, as in the FCC survey, who indicated no preference.

privacy be a *per se* violation of this test? In practice, requiring proof that an option is not as effective as a default seems to weaponize *Central Hudson*'s fourth prong in situations where there is no obvious "non-speech" regulatory alternative—that is, a direct economic regulation, like banning the product or setting a price control.[81] Similar to direct economic regulations,[82] using less-burdensome modes of regulation in the fourth prong of *Central Hudson* would make any speech-burdening regulation that took a form other than a forced choice or an opt-out unconstitutional absent compelling evidence. Indeed, although not applicable to most privacy regulations, even an opt-out system could be challenged in many cases on the grounds that disclosure or education of the public would be just as effective. This is especially worrying online, where providing services is more common than providing tangible products.

As worrying as it is for cases governed by *Central Hudson*, it is even worse for content-neutral intermediate scrutiny cases. A court following *Edwards* could invoke this principle to generate its own, less burdensome alternatives in virtually any case regulating a service provider: can you prove that a less burdensome mode of regulation is just as effective? In some ways the approach of *Reynolds* and *Billups* is even stricter, even if the plaintiff is apparently responsible for generating alternatives: before imposing a mandate, did you consider or try a default? An opt-in? An education program? Do you have to systematically go through the different modes of regulation *every time*? Although rejecting post-hoc testimony by officials seems intuitive, this demonstrates the difficulty of complying with the rule in practice: does every statute that burdens speech require a detailed, costly investigation of every "readily available" alternative before it is

[81] *See infra section* II.B.ii (arguing that, in practice, if the Supreme Court is able to articulate a direct economic regulation that also advances the stated interest it will strike down the speech regulation in question); *cf.* Carpenter v. United States, 138 S. Ct. 2206, *Cf.* 2267–72 (2018) (Gorsuch, J., dissenting) (arguing that a better approach to privacy in the Fourth Amendment context would be to abandon the "reasonable expectation" test and rely on a property-based analysis, relying on legislative bodies to create digital property rights—such property rights might also be an alternative to the design regulation in question here).
[82] *See e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 372 (2002).

enacted? Justice Breyer has written several times about the sheer amount of regulations that are caught up in mechanical approaches to content-based laws.[83] The breadth of *content-neutral* regulations that would be subject to this scrutiny is staggering.

D. *Ward* Circuits

However, for the most part, Circuit Courts still follow the deferential, proportionality test established in *Ward*—but the Circuits are split in their attentiveness to Supreme Court precedent. Below, I catalogue the application of content-neutral intermediate scrutiny that grapples with and incorporates the holding of *McCullen* and the more common tendency to simply ignore it.

i. Circuits Incorporating *McCullen*

The First Circuit has correctly incorporated *McCullen* when applying content-neutral intermediate scrutiny. In both *Signs for Jesus v. Pembroke*,[84] and *March v. Mills*,[85] it cited *Ward* and engaged in a deferential proportionality test to uphold a sign-ordinance and a noise restriction ordinance that protects people in health services buildings, respectively.[86] In *Signs for Jesus*, the court cabined *McCullen* in a footnote: it held that where there was a "tenuous" connection between the interest asserted and the restriction's effects, increased scrutiny was appropriate, but where the connection is "immediately apparent"—as was the case there—such increased scrutiny had no place.[87]

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[83] Barr v. American Ass'n of Political Consultants, 140 S. Ct. 2335, 2360 (2020) (Breyer, J., concurring in the judgment in part and dissenting in part) (arguing that the plurality's approach calls in to question "the regulation of securities sales, drug labeling, food labeling, false advertising, workplace safety warnings, automobile airbag instructions, consumer electronic labels, tax forms, debt collection, and so on"); Reed v. Town of Gilbert, 576 U.S. 155, 177 (2015) (Breyer, J., concurring in the judgment) ("virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination."); Sorrell v. IMS Health, Inc., 564 U.S. 552, 582 (2011) (Breyer, J., dissenting) ("many, perhaps most, activities of human being living in communities take place through speech").
[84] 977 F.3d 93 (1st Cir. 2020).
[85] 867 F.3d 46 (1st Cir. 2017), *cert denied*, 138 S. Ct. 1545 (1st Cir. 2018).
[86] *Signs for Jesus*, 977 F.3d at 106–07; *March*, 867 F.3d at 64–68.
[87] *Signs for Jesus*, 977 F.3d at 107, n. 8.

The First Circuit did strike down a "ballot selfie law" under content-neutral intermediate scrutiny, but it did so on the basis that there was *no* evidence of the harm in question, so while the interest in preventing vote-buying was compelling it was not advanced if vote-buying did not actually exist[88]; to use the terminology of this paper, it failed the "actually advances" prong. Furthermore, after noting the severity of the burden,[89] the court alternatively invoked *McCullen* in holding[90] that New Hampshire failed to use less-restrictive laws that were already on the books to prevent vote-buying.[91] Similarly, in striking down a ban on sitting or standing in medians in *Cutting v. City of Porland*[92] the First Circuit relied on *McCullen*, but emphasized that this law was "truly exceptional"[93] in applying more exacting scrutiny, which included both the pre-*McCullen* examination of the amount of speech which did not advance the interests,[94] and a post-*McCullen* finding that less restrictive alternatives were not adequately considered.[95]

These cases create a coherent doctrine out of *McCullen*: where there is a severe burden, either qualitatively or quantitatively, on speech that does not advance the interest in question, it is appropriate to generate less restrictive alternatives and shift the burden to the state. Here, one law created a real burden on voting, a fundamental right closely intertwined with the First Amendment, and another banned a huge quantity of valuable speech. In both cases, the invocation of the more stringent analysis in *McCullen* is appropriate, but both cases also make it clear that in without severe burdens this stricter scrutiny is not appropriate.

[88] Rideout v. Gardner, 838 F.3d 65, 72–73 (1st Cir. 2016).
[89] *Id.* at 73.
[90] This was arguably dicta given it had already held the state failed the initial burden of proving the law advanced its asserted interests.
[91] *Rideout*, 838 F.3d at 73 (citing McCullen v. Coakley, 573 U.S. 464, 486 (1st Cir. 2014).
[92] Cutting v. City of Portland, 802 F.3d 79 (1st Cir. 2015).
[93] *Id.* at 87–89.
[94] *Id.* at 89–91 (finding the amount of expression suppressed without advancing the interest significant).
[95] *Id.* at 91–92.

The Third Circuit has a relative paucity of cases, but its most recent case post-dates *McCullen* and *Reed* and also articulates a theory similar to the First Circuit. In *Bruni v. City of Pittsburgh*,[96] the court upheld a restriction on congregating outside hospitals or other healthcare facilities,[97] rejecting *McCullen* as a total reworking of content-neutral intermediate scrutiny. Instead, the court held that "while *McCullen* and *Bruni I* made clear that a 'rigorous and fact-intensive' inquiry will be required where a restriction imposes a significant burden on speech, they also made clear (and logic dictates) that a less demanding inquiry is called for where the burden on speech is not significant."[98] Because the ordinance in question was far narrower than the one in *McCullen*, the court correctly concluded that increased scrutiny was inappropriate.

Similar to the First and Third Circuits, the Sixth Circuit has also incorporated *McCullen* into existing content-neutral intermediate scrutiny doctrine. In upholding a Lexington ordinance that regulated the delivery of unsolicited written materials in *Lexington H-L Servs. V. Lexington-Fayette Urban Cty. Gov't*[99] the Circuit Court invoked *Ward* in establishing a fairly deferential review of the statute.[100] It rejected the idea that *McCullen* overturned *Ward*, instead reasoning that *McCullen* was the rare "exceptional" case where the burden on expression was so great as to merit heightened scrutiny.[101] Similarly, in *Crookston v. Johnson*,[102] a majority of the court rejected *Rideout*'s application of *McCullen*,[103] reasoning that the ban on photographs of ballots[104] was reasonable given the long-standing regulation of polling places and the real

[96] 941 F.3d 73 (3d Cir. 2019), *cert denied*, 2021 U.S. LEXIS 472 (2021).
[97] *Id.* at 79.
[98] *Id.* at 89 (citing Bruni v. City of Pittsburgh 824 F.3d 353, 372 (3d Cir. 2016)).
[99] 879 F.3d 224, 227 (6th Cir. 2018) *cert denied*, 140 S. Ct. 316 (2019).
[100] *Id.* at 229–32.
[101] *Id.* at 232.
[102] 841 F.3d 396 (6th Cir. 2016)
[103] *Id.* at 402–04 (Cole, J., dissenting).
[104] *Id.* at 398 (majority opinion).

problem of vote-buying in the circuit.[105] That is, the court did not reject the principle that there are exceptional cases that merit stricter scrutiny, but rather disagreed with *Rideout*'s finding that the burden imposed by ballot-selfies was exceptional given the history of polling-place regulations. It is beyond the scope of this note to weigh in on which circuit applied *McCullen* correctly; what is important is both Circuits recognize that the *McCullen* standard is reserved for exceptional cases.

In the First, Third, and Sixth Circuits deregulatory-minded litigators who attempt to raise the level of scrutiny or import the *U.S. West* approach of invoking less burdensome modes of regulation either have to overcome circuit precedent or show that the burden on speech is so great that it merits heightened scrutiny. This preserves the post-*Lochner* consensus that ordinary health and safety regulations will not be second-guessed by the courts.

ii. Circuits With Inconsistent or Weak Precedent

Unfortunately, most of the other circuits have inconsistent precedent or have simply ignored *McCullen*. This makes them vulnerable to attempts by deregulatory litigators who can argue that *McCullen* represents a fundamental shift in the application of content-neutral intermediate scrutiny without having to deal with adverse circuit precedent.

The Fourth Circuit has not incorporated *McCullen* consistently. Only a year before deciding *Billups*, decided *Capital Associated Indus. v. Stein*[106] where the court invoked *Nat'l Ass'n of Life Advocates v. Becerra*[107]—one of the most notoriously deregulatory First Amendment decisions in recent history[108]—to hold that regulations of professional conduct

[105] *Id.* at 399–401. However, the majority refused to rule on the merits, merely refusing a preliminary injunction due to the closeness to the election. *Id.* at 401.
[106] 922 F.3d 198 (4th Cir. 2019), *cert denied*, 140 S. Ct. 666 (2019).
[107] 138 S. Ct. 2361 (2018).
[108] *See supra* note 1.

merely require "a substantial state interest" and a regulation "sufficient drawn" to enforce it.[109] The application of that standard is deferential, approaching rational basis review.[110] Far from overruling *Stein*, *Billups* simply ignored it. Perhaps the general deference to regulations of lawyers is lurking the background here,[111] but *Stein*'s odd doctrinal approach in developing a deferential standard from *NIFLA* makes it uniquely vulnerable to a challenge.

The D.C. Circuit has ignored both *McCullen* and its own precedent in *Edwards*. For instance, it upheld challenges of regulations of city lampposts[112] and presidential inauguration regulations[113] with little difficulty. In the former case the Circuit Court cites both *McCullen* and *Edwards* for the proposition that the state has the burden to prove it has a substantial interest and that it is narrowly tailored.[114] However, it otherwise ignores them in it application,[115] emphasizing that there is no strict evidentiary requirement under intermediate scrutiny.[116] Similarly, in the latter case the Circuit Court cites *McCullen*[117] but does not apply its holding, conducting a deferential review (citing *Ward* in the application instead of *McCullen*) and emphasizing that the narrow tailoring requirement is not a "least intrusive" alternative test.[118]

The remaining circuits have no inconsistent precedent and have mostly stayed true to *Ward*—unfortunately, they have done so by ignoring *McCullen* entirely. The Second Circuit has not, in a published case, applied content-neutral intermediate scrutiny in over seven years. The

[109] *Stein*, 922 F.3d at 209–210.
[110] *Id.* ("Another state legislature might balance the interests differently. But intermediate scrutiny requires only a 'reasonable fit between the challenged regulation' and the state's interest.") (citing United States v. Chester, 628 F.3d 673, 683 4th Cir. 2010).
[111] The statute barred corporations from practicing law. *Stein* 922 F.3d at 209.
[112] *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391 (D.C. Cir. 2017).
[113] *A.N.S.W.E.R. Coal. v. Basham*, 845 F.3d 1199 (D.C. Cir. 2017).
[114] *Act Now to Stop War & End Racism Coal.*, 846 F.3d at 407.
[115] *Id.* at 407–09.
[116] *Id.* at 408.
[117] *Basham*, 845 F.3d at 1214.
[118] *Id.* at 1214–15.

latest case was deferential,[119] but it pre-dated *McCullen* (and *Reed*) and is therefore of dubious precedential value.

The Fifth Circuit, reviewing a statute that required nude dancers to be over twenty-one years of age in *Doe v. Landry*,[120] applied *O'Brien*, as modified by *Ward*, in a deferential manner, but did not mention *McCullen*.[121] Similarly, in upholding a permit requirement for a park in *Moore v. Brown*,[122] the court did not even engage in a discussion of whether the permit restricts more speech than is necessary, merely concluding that the restriction advances the interest of the state and is therefore constitutional under *Ward*.[123] And in a case that admittedly predates both *Reed* and *McCullen*, the Fifth Circuit held that a tour guide licensing rule was constitutional, also omitting the test of whether the regulation burdened more speech than necessary, concluding that advancing the legitimate interest of the state was enough.[124] Regardless of the wisdom of the outcomes, they read as though the Fifth Circuit is privileging their own deferential precedent over possibly conflicting Supreme Court precedent.

Similarly, The Eighth Circuit, in *Havlak v. Village of Twin Oaks*,[125] upheld a permit requirement by citing *Ward* and conducting a relatively deferential analysis of whether too much speech is suppressed without citing *McCullen*.[126] Although there is substantial case law applying content-neutral intermediate scrutiny prior to *McCullen* and *Reed*, much of it connected to the Westoboro Baptist Church,[127] it is of dubious precedential value.

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[119] Lederman v. N.Y. City Dep't of Parks & Rec., 731 F.3d 199, 202–03 (2d Cir. 2013).
[120] 909 F.3d 99, 104 (5th Cir. 2018).
[121] *Id.* at 110–12.
[122] 868 F.3d 398, 401 (5th Cir. 2017).
[123] *Id.* at 403–04.
[124] Kagan v. City of New Orleans,753 F.3d 560, 562 (5th Cir. 2014).
[125] 864 F.3d 905 (8th Cir. 2017)
[126] *Id.* at 915–18.
[127] Phelps-Roper v. Koster, 713 F.3d 942, 945–46 (8th Cir. 2013) (detailing the history of litigation).

The Ninth Circuit has also not explained the impact of *McCullen*, upholding a ban on unattended recycling containers in *Recycle for Change v. Oakland*[128] by invoking *Ward* and engaging in a fairly cursory and deferential review.[129] The review in *Vivid Entm't, LLC v. Fielding*[130] was more nuanced, reiterating that under content-neutral intermediate scrutiny the least restrictive alternative was not required and requiring the plaintiffs to generate alternatives (which the court rejected).[131] However, despite narrowly post-dating *McCullen*, it did not address that case. In *Doe v. Harris*,[132] also narrowly post-dating *McCullen*, the court anticipated *Packingham*, holding that restrictions on sex offenders accessing the internet failed content-neutral intermediate scrutiny because of ambiguities in the act,[133] its burdens on anonymous communication,[134] and because the 24-hour reporting requirement is unnecessarily burdensome.[135] This decision in particular is consistent with the theory of *McCullen* and *Packingham* articulated above—that extraordinary burdens merit extraordinary scrutiny—but that was not how the Ninth Circuit articulated the case.

The Eleventh Circuit has also not adequately incorporated *McCullen*, with only one case on point since 2014. In *Stardust, 3007 LLC v. Brookhaven*,[136] the court held that after a "substantial interest" was established, the only appropriate review was "whether the Code is designed to serve that interest and whether it leaves open alternative avenues of communication."[137] Similar to the Fifth Circuit, this is so deferential it is arguably not even

[128] 856 F.3d 666 (9th Cir. 2017).
[129] *Id.* at 675.
[130] 774 F.3d 566 (9th Cir. 2014).
[131] *Id.* at 581–82.
[132] 772 F.3d 563 (9th Cir. 2014).
[133] *Id.* at 578–79.
[134] *Id.* at 579–81.
[135] *Id.* at 581–82.
[136] 899 F.3d 1164 (11th Cir. 2018).
[137] *Id.* at 1174.

consistent with *Ward*, let alone *McCullen*. However, as mentioned above, they also created a "Frankenstein" scrutiny to consider a regulation of professional speech.[138]

In all these Circuits the lack of consistent precedent makes them vulnerable. A challenger could cite *Edwards*, *Reynolds*, and *Billups*, as either persuasive or precedential, depending on the circuit in question, and point out that none of the more deferential precedents grappled with the language from *McCullen*. And they could supplement those arguments with Justice Kennedy's ambiguous prose in *Packingham*. As discussed above, if the court accepts their basic argument the approach from *U.S. West* gives them an almost infinitely flexible mechanism for generating less-burdensome alternatives and thus a convincing basis to strike down the law.

IV. Conclusion

Discussions of the "Lochner-ization" of the First Amendment have focused on the expansion of speech subject to strict scrutiny or the *Central Hudson* test as well as the expansion of what counts as "speech" in the first place. However, there has been little to no sustained examination of the changes in content-neutral intermediate scrutiny, especially in the wake of *McCullen*. As privacy and economic regulations, especially of online services, increasingly raise at least plausible burdens on speech, it is critical that courts make a distinction between content-based regulations, which raise the specter of government censorship and should virtually never be allowed, and content-neutral regulations, which should generally survive so long as they are not obviously pretextual or unjustified.

[138] *Supra* note 30.

Applicant Details

First Name	**Laila**
Last Name	**Kassis**
Citizenship Status	**U. S. Citizen**
Email Address	**lkassis@umich.edu**
Address	**Address** Street **8811 75th Ave** City **Glendale** State/Territory **New York** Zip **11385** Country **United States**
Contact Phone Number	**3472959831**

Applicant Education

BA/BS From	**State University of New York-Binghamton**
Date of BA/BS	**May 2016**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 7, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Brensike Primus, Eve
ebrensik@umich.edu
734-615-6889

Mortenson, Julian
jdmorten@umich.edu
734-763-5695

Goldman, Edward
egoldman@umich.edu
734-647-2069

Silver, Charles
csilver@law.utexas.edu
512-232-1337

References

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Coordinator of Tutorial Services
Resnick Learning Center
454 Delhi Drive
Delhi, New York 13753
(607) 437-9451
monaco.jm54@gmail.com

Meital Rosso
Partner
The Rosso Law Firm
190-21B Jamaica Ave
Jamaica, New York 11423
(718) 776-4900
meitalrosso@gmail.com

Pantelis Skulikidis
Partner
Gary Dmoch & Associates
17122 Northern Blvd

Flushing, New York 11358
(718) 939-4444
garydmoch@gmail.com
This applicant has certified that all data entered in this profile and any application documents are true and correct.

Laila Kassis
8811 75th Ave., Glendale, NY 11385
(347) 295-9831 • lkassis@umich.edu

April 18, 2022

The Honorable Indira Talwani
U.S. District Court for the District of Massachusetts
John Joseph Moakley U.S. Courthouse
One Courthouse Way, Room 4-710
Boston, MA 02210-3002

Dear Judge Talwani:

I am a recent graduate of the University of Michigan Law School and I am writing to apply for a clerkship in your chambers for the 2022–2023 term.

My passion for civil rights and criminal justice reform drives my commitment to become an exceptional litigator. Because of this passion, I readily seize every opportunity to develop strong litigation skills. For example, as a judicial law clerk, I drafted numerous orders on non-dispositive and dispositive civil and criminal motions. Further, as part of the Civil-Criminal Litigation Clinic, I refined my research and writing skills by drafting motions, answers, and conditional dismissals. Finally, I gained experience working on a variety of civil rights matters through the Civil Rights Litigation Initiative Clinic.

Lastly, as an Arab-American woman and first-generation college student, I have a unique background and perspective. My father came to the United States as an immigrant from Damascus, Syria, with minimal English language skills and only a middle school diploma, but with hopes of achieving the American Dream. I come from humble beginnings which have instilled in me a strong work ethic that I trust will make me a successful clerk.

I have attached my resume, undergraduate and law school grade sheets, and writing samples for your review. Additionally, the following professors have written letters of recommendation on my behalf:

- Professor Edward B. Goldman: egoldman@med.umich.edu, (734) 647-2069
- Professor Julian Davis Mortenson: jdmorten@umich.edu, (734) 763-5695
- Professor Eve Brensike Primus: ebrensik@umich.edu, (734) 615-6889
- Professor Charles M. Silver: csilver@law.utexas.edu, (512) 232-1337

Thank you so much for your time and consideration.

Respectfully,
Laila Kassis

Laila Kassis

8811 75th Ave., Glendale, NY 11385
(347) 295-9831 • lkassis@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor, cum laude — May 2021
Journal: Michigan Law Review, *Senior Editor*
Honors: Equal Justice America Legal Services Fellow
Activities: Middle Eastern and North African Law Students Association, *President*
Student Animal Legal Defense Fund, *President*

BINGHAMTON UNIVERSITY, STATE UNIVERSITY OF NEW YORK — Binghamton, NY
Bachelor of Arts in Political Science and in Sociology, *magna cum laude* — May 2016

EXPERIENCE

U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS — El Paso, TX
Judicial Law Clerk for the Honorable Frank Montalvo — Aug. 2021–Apr. 2022

CIVIL RIGHTS LITIGATION INITIATIVE CLINIC — Ann Arbor, MI
Student Attorney — Fall 2020

- Investigated factual background and use of facial recognition technology by city of Detroit, researched cause of actions for complaint, including Fourth Amendment implications, and drafted memo on *Monell* liability for client who was wrongfully arrested based on facial recognition technology.
- Drafted letter to city officials urging that charges be dropped, conducted media interviews, and performed First Amendment research for a motion to dismiss while representing a 17-year-old high school student cited for impeding traffic for allegedly protesting in the street during a Black Lives Matter rally.

KIRKLAND & ELLIS LLP — New York, NY
Summer Associate (permanent offer extended) — Summer 2020

- Abbreviated summer program due to COVID-19.

CRIMINAL APPELLATE PRACTICE CLINIC — Ann Arbor, MI
Student Attorney — Fall 2019

- Represented convicted felon on direct appeal; drafted and mooted criminal appellate brief.
- Reviewed and analyzed trial and sentencing records and communicated with client to identify issues for appeal. Conducted legal research on state evidentiary rules, state and constitutional speedy trial rights, and errors in guideline scoring for sentencing.

WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS — Washington, D.C.
Legal Intern — Summer 2019

- Researched and drafted memos on housing access, criminal justice reform, and third-party standing.
- Analyzed legislative history to support the legal reasoning of comments submitted during the notice-and-comment period that challenged proposed regulations as arbitrary and capricious.
- Interviewed and provided legal advice to pre-trial detainees, prisoners, and low-income workers.

THE ROSSO LAW FIRM P.C. — Hollis, NY
Real Estate Paralegal — Dec. 2017–June 2018

- Assisted real estate investors in complex real estate transactions, including short-sales and REOs, by managing the transaction process and addressing arising legal issues through closing.
- Drafted and filed incorporation documents and summons and complaints for breach of contract matters.

ADDITIONAL

Bar Admission: New York (Admitted Dec. 2021)
Public Service: AmeriCorps Member for the American Red Cross (Oct. 2015–Sept. 2016)
Interests: Sewing, Film Photography, Thrifting/Antiquing, Traveling, True Crime and History Books

Laila Kassis
The University of Michigan Law School
Cumulative GPA: 3.646

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Charles M. Silver	A-	4	
Torts	Christina B. Whitman	A-	4	
Contracts	Bruce W. Frier	B+	4	
Legal Practice Skills I	Mark K. Osbeck	S	2	
Legal Practice: Writing & Analysis	Mark K. Osbeck	S	1	

Winter 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Constitutional Law	Julian Davis Mortenson	A	4	
Criminal Law	Scott Hershovitz	B	4	
Prisons and the Law	Margo Schlanger	P	3	
Legal Practice Skills II	Mark K. Osbeck	S	2	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Reproductive Justice	Edward B. Goldman	A+	2	
Criminal Appellate Practice	Douglas Baker & Katherine Marcuz	A-	3	
Criminal Appellate Practice Field	Douglas Baker & Katherine Marcuz	A-	1	
Legislation and Regulation	Julian Davis Mortenson	A-	4	
Criminal Justice: Investigation & Police Practice	Eve Brensike Primus	B+	4	

Winter 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Rights Litigation	Michael J. Steinberg	P	3	
Civil-Criminal Litigation Clinic	David A. Santacroce	P	4	
Civil-Criminal Litigation Clinic Seminar	David A. Santacroce	P	3	
Model Rules and Beyond	Robert E. Hirshon	P	3	
Research	Leah Litman	P	1	

Due to COVID-19, the University of Michigan Law School instituted a mandatory pass/fail policy for all Winter 2020 courses.

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Rights Litigation Initiative	Michael J. Steinberg	A-	4	
Disability Rights	Samuel R. Bagenstos	A-	3	
Federal Courts	Daniel Deacon	A-	4	
Evidence	Richard D. Friedman	P	4	Received a B+

Winter 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Anti-Corruption Law & Practice	Timothy L. Dickinson	A	2	
Criminal Procure: Bail to Post-Conviction Review	Barbara McQuade	A-	3	
First Amendment	Leonard M. Niehoff	A-	4	
Habeas Corpus	Eve Brensike Primus	A-	2	
Employment Law	Jennifer B. Salvatore	P	3	Received a B+
Mini-Seminar Clerking: The Nuts and Bolts	Kerry Kornblatt & Jessica Lefort	S	1	

Grading System Description
P represents a Pass.
S represents Satisfactory used for Legal Practice and Mini-Seminars.

Laila Kassis
State University of New York-Delhi
Cumulative GPA: 3.53

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introductory Psychology I		B-	3	
Intro to Software Applications		B	3	
Statistics		B+	3	
Intro to Criminal Justice		B+	3	
Freshman Seminar		B+	1	
Public Speaking		C	3	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
United States History I		A	3	
Freehand Drawing		A-	3	
American Government		A-	3	
Introductory Sociology		A-	3	
General Biology I		C	4	

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
History of West & World Civ I		A	3	
Ethics		A	3	
Cultural Anthropology		A	3	
Public Policy		A	3	
Health and Wellness		A	3	

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Philosophy		A	3	
Civil Liberties		A	3	
Business Law I		A	3	
Law, Courts and Politics		A	3	

Laila Kassis
State University of New York-Binghamton
Cumulative GPA: 3.771

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Political Anthropology		B+	4	
Identifying the Criminal		B-	4	
Found Of Social Theory (LEC)		A	4	
Political Behavior		B-	4	

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Social Research Methods		A	4	
Society and the Environment		A	4	
U-Turn Mentoring		A	2	
Mass Media & The Environment		A	4	
Black Nationalism in the US		B+	4	

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Research on Human Rts. & Labor		A	4	
Criminal Law		A	4	
Internship		A	4	
American Sign Language I		A	4	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Independent Study		A	4	
American Sign Language II		A	4	
Underworlds		A	4	
Environmental Movement in US		A	4	
American Political Development		A	4	

University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109

Eve Brensike Primus
Yale Kamisar Collegiate Professor of Law
ebrensik@umich.edu

April 18, 2022

The Honorable Indira Talwani
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 4-710
Boston, MA 02210-3002

Dear Judge Talwani:

Laila Kassis is smart, passionate, and will put in the time to do the job well. I am happy to submit this letter of recommendation in support of her clerkship application.

I taught Laila in two classes: a large criminal procedure course and a smaller course on the scope of the writ of habeas corpus. Although Laila did well in both courses, it was in the habeas corpus class where I was able to see how well Laila's mind works when she is given a real-world problem and a little time to think about how to solve it. In my habeas class, students work with case files and are asked to identify the criminal procedure arguments and talk about the procedural barriers to review of those arguments in federal habeas courts. Students then have to think about creative ways to interpret the law to get around those procedural barriers. Laila was very good at detecting issues and was adept at thinking in sophisticated ways about how the doctrine could be shaped going forward. When given a day or two to think deeply about doctrine, she comes up with wonderful insights.

The final examination for my habeas corpus class consists of a forty-eight hour take-home examination that requires students to confront a ninety-page record from a fictional habeas corpus case and write a memorandum detailing the procedural and substantive habeas corpus issues presented by the record. Laila wrote a very good exam. Many students are quite confused by the procedural intricacies of the Great Writ, but not Laila. She was able to parse through a complicated record and deftly identify and analyze the key procedural and substantive issues. I have no doubt that you would find her knowledge of habeas corpus law and her writing abilities to be incredibly useful in your chambers.

What makes Laila even more impressive, however, is that she got to this point in life despite all odds. She does not come from a privileged background; rather, she is the first person in her family to go to college. Her father came to the United States as an immigrant from Syria who had minimal English skills and only a high school diploma. Laila's intellect and her work ethic have enabled her to succeed. When Laila puts her mind to something, there is nothing that she cannot accomplish.

Laila would also come to your chambers with knowledge of how federal courts operate. In August of 2021, she began a two-year clerkship for Judge Frank Montalvo in the U.S. District Court for the Western District of Texas. As a result, she will be familiar with the demands placed on law clerks and with the processing of federal cases.

Finally, Laila is well liked by her peers as evidenced by her selection to be President of the Middle Eastern and North African Law Students Association and the Student Animal Legal Defense Fund. She will fit in well with any group of law clerks.

As I hope this letter conveys, I think Laila will be an invaluable law clerk to whomever is fortunate enough to hire her. Please do not hesitate to contact me should you have any questions or should you require any additional information.

Sincerely,

Eve Brensike Primus

MICHIGAN LAW
UNIVERSITY OF MICHIGAN
701 South State Street
Ann Arbor, MI 48109-3091

JULIAN DAVIS MORTENSON
James G. Phillipp Professor of Law

April 22, 2022

The Honorable Indira Talwani
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 4-710
Boston, MA 02210-3002

Dear Judge Talwani:

I write in support of Laila Kassis's application for a clerkship in your chambers. Laila is smart, hard-working, outgoing, and thoroughly down-to-earth. She'd be great with the other clerks in chambers, and she'd generate high-quality work product that you could reliably count on. She's a terrific candidate, and I think you'd really enjoy meeting her.

Laila has taken two classes with me: first year constitutional law and an upper-class course on legislation and regulation. In both classes, she was consistently excellent as a classroom participant, ready to engage with questions at both the highest and most detailed levels of generality. I remember in particular one discussion we had about the constitutionality of the Religious Land Use and Institutionalized Persons Act after the City of Boerne v. Flores decision, which I gave to the class as an in-class, on-the-spot follow-up after our discussion of Boerne. She was able to swiftly shift gears to other sources of congressional authority, and did a particularly impressive job of thinking through the implications for RLUIPA under South Dakota v. Dole's spending clause analysis—a topic we had last discussed multiple weeks earlier. It was really a remarkable bit of on-the-fly synthesizing analysis.

Laila's work on the final exam in each class was excellent. She clearly organizes the complex moving parts of a multi-part analysis, and her tone is effectively unmannered and plain-spoken. Perhaps her most interesting analysis among the exams was on an open-ended question about the presumption of parallelism in equal protection classifications—i.e., the instinct that a racial classification should get strict scrutiny regardless of whether it seems intended to oppress traditionally underrepresented groups or to help them overcome the legacy of exclusion. She wrote a really insightful, deeply engaged response that wove together examples from throughout our equal protection unit and offered a measured assessment of both the logic and the risks of such parallelism. Faced with an open-ended normative question like that one, many students retreat to recitation of doctrine; Laila was able instead to use the doctrine as a foundation for a larger reflection on the deeper logic of an entire area of law. It was a great performance.

Laila is fully committed to pursuing a career in litigation, and for that reason has an especially strong interest in clerking. Her ideal long-term position would be at a plaintiff's side civil rights firm, an interest that stems at least in part from her experience as the daughter of an initially undocumented Syrian immigrant. Particularly in the wake of September 11, the problem of anti-immigrant and anti-Arab prejudice became especially salient for Laila, and she has dedicated much of her work since high school to developing the foundation for a career devoted to justice and equality. Her college work included researching and lobbying for anti-racial profiling legislation with Citizen Action of New York, and for the admission of Syrian refugees with the ACLU.

She's built on this background to devote an enormous amount of time throughout her law school career to developing litigation skills in the public interest and equal justice arena, from her first summer job doing housing work at the Washington Lawyer's Committee to the pair of clinics she's worked in as a 2L. She speaks with pride and enthusiasm of her clinical client work, including representing a teenage girl who was civilly charged for participating in a peaceful Black Lives Matter rally, and representing a man who was wrongfully arrested on the basis of flawed facial recognition technology. Her enthusiasm about this work is palpable, and well befits someone with Laila's goals.

In short, Laila is a talented, effective, and highly motivated law student who is sure to be an excellent clerk. Please let me know if there's anything else I can do to help you evaluate her application. I'd be happy to speak with you further on her behalf.

Best regards,
Julian Davis Mortenson
James G. Phillipp Professor of Law
Michigan Law School

Julian Mortenson - jdmorten@umich.edu - 734-763-5695

University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109

Edward B. Goldman
Adjunct Professor of Law
egoldman@med.umich.edu

April 18, 2022

The Honorable Indira Talwani
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 4-710
Boston, MA 02210-3002

Dear Judge Talwani:

Laila Kassis was a student in the fall term of 2019 in my University of Michigan Law School seminar on Reproductive Justice (RJ). This is a small class where we consider a wide range of issues starting with the rights of pregnant women and ending with post-birth accommodations with sessions on negative and positive rights, what is RJ, informed consent for newborn screening, contraception, abortion, genetic testing, assisted reproductive technology and several other RJ issues. The idea is to get the students to understand that RJ is really all about balancing societal issues with individual rights and looking at where we are (reproductive rights) and where a fair and just society "ought" to be (reproductive justice).

She was very interested in and passionate about RJ issues. I ask each student to select a state and become an expert on its RJ laws. Laila did that, checked her state's laws every week and was always willing to update the class on the laws in her state. Laila entered the seminar somewhat knowledgeable about RJ and by the end she was more attuned to the nuances in the ongoing RJ debates and better able to understand and articulate RJ arguments and counter arguments.

Laila was a very positive and active participant in the seminar. Some students find it difficult to speak in small groups, but she was always ready to express a reasoned viewpoint. When pressed to argue the "opposite side," she was willing to consider arguments even if she did not agree with them.

The seminar requires an original research paper. Laila chose to write about crisis pregnancy centers (CPC's). She carefully defined what these centers are, how they seek to mislead their clients and what the Supreme Court decision in NIFLA v. Becerra (138 S. Ct. 2361 (2018)) means for these centers and their rights to free speech. I have been teaching this seminar for several years and she was the very first student to consider this issue. I was pleased to see her take on this difficult topic and even more pleased when she produced a thoughtful and nuanced paper. Not only did she conduct thoughtful, detailed, and excellent research, but she also carefully considered commercial speech and how it is regulated. Her paper had 165 footnotes all to relevant articles and cases. She really dug deeply into her topic and considered law, ethics and ways to balance free speech with the right of the consumer not to be misled. She suggested a legislative approach to regulate false and misleading commercial speech made by CPCs. After creating a proposed regulation, she spent several pages carefully considering arguments for and against the proposed regulation, ultimately concluding that the regulation could withstand judicial review.

This was an excellent creative paper showing that Laila has good ideas and superior research skills. I was impressed with her ability to consider both sides of the argument and articulate reasoned arguments. She is clearly an excellent researcher.

Laila is eager to learn, delightful, upbeat and easy to talk to. She needed only minimal direction and attention for her research project, but knew when to ask for help or when to just use a few minutes to talk through an issue.

How would she perform as a clerk? As a senior editor of the Michigan Law Review, Laila has been exposed to excellent writing. Her work as an editor helps her to understand, edit and create well-crafted papers.

Since my seminar Laila has obtained some real life experience working on civil rights cases in the Civil Rights Initiative Clinic. She worked on wrongful arrest and police misconduct cases and was able to combine common sense and detailed legal research to make compelling arguments for her clients.

I was very pleased to have Laila as a student and get to know her. I am confident that she will be an excellent lawyer committed to the profession as a way to help create a just society. I strongly believe Laila will be an exceptional clerk.

Very Truly Yours,

Edward Goldman, J.D.
Adj. Associate Professor, Univ of Michigan Schools

Edward Goldman - egoldman@umich.edu - 734-647-2069

of Medicine and Law

Edward Goldman - egoldman@umich.edu - 734-647-2069

Charles Silver, McDonald Endowed Chair in Civil Procedure
School of Law, University of Texas at Austin
727 E. Dean Keeton St.
Austin, TX 78705

June 8, 2021

Re: Application of Laila Kassis for Judicial Clerkship

Dear Judge:

Laila Kassis was a student in my course on federal civil procedure in the Fall term of 2018, when I was a Visiting Professor at the University of Michigan School of Law. She did very well, placing in the upper third of a class that, on average, was very strong. I called on her several times during the semester and got to know her during office hours. She was always personable, prepared on the readings, and ready with something intelligent to say.

During that semester, Laila and I exchanged emails often, talked during office hours about procedural issues, and reviewed a couple of practice exams that she completed. After the term ended, Laila stayed in touch. She sent me a judge's opinion in a sanctions matter that she thought I'd enjoy, wrote me about her experience as a summer intern at the Lawyer's Committee on Civil Rights, and consulted me about a couple of procedural issues that she encountered. It was always a pleasure to hear from her.

I was pleased to provide a letter supporting Laila's first round of applications for a judicial clerkship, which ended successfully with an offer from a federal district court judge in Texas. Now that she is apply for appellate clerkships, I am happy to offer my support again.

Laila's resume speaks for itself. She did well in law school, landing a position as Senior Editor on the Michigan Law review, and held leadership positions in student organizations. What does not come through are her remarkable personality and maturity. Regarding the latter, the following story speaks volumes. Laila received an A- in my civil procedure class. She would have received an A, but one of her answers to an essay question exceeded the word limit so she lost a few points. When she reviewed her exam and learned what happened, she did not complain. Instead, she wrote me the nicest note, saying how much she enjoyed the class and how disappointed she was in herself for the mistake. In 30+ years of teaching, I cannot remember receiving another such letter. I admire her enormously.

Laila has a great heart too. She is a first-generation immigrant from Syria who works to end discrimination against Muslims and other minorities. It is likely, I think, that she will spend a goodly portion of her professional career as a civil rights attorney handling cases in the federal courts.

In Laila, you have an opportunity to hire a remarkable person. She deserves a serious look.

Best wishes,

Charles Silver

Laila Kassis
8811 75th Ave., Glendale, NY 11385
(347) 295-9831 • lkassis@umich.edu

WRITING SAMPLE: CRIMINAL ORDER

This writing sample is an order in a criminal case that I drafted during my clerkship for the Honorable Frank Montalvo. The criminal defendant filed four *pro se* motions requesting relief pursuant to the Fourth and Fifth Amendments to the United States Constitution. The Honorable Frank Montalvo provided me permission to use this piece as a writing sample. The research and writing contained within this document are exclusively my work.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,	§	
	§	
	§	
	§	
v.	§	[redacted]
	§	
	§	
	§	
	§	
[redacted]**.**	§	

ORDER ON *PRO SE* MOTIONS

Before the court are "Motion to Review All Warrents [sic] and Their Supporting Evidence Including Sworn Testimony for Validity in Cause: [redacted]" [ECF No. 205], filed June 11, 2021 by [redacted] ("Defendant"); "Motion to Suppress 10 of the 11 Perported [sic] 'Victims' as Fruit of the Poision [sic] Tree" [ECF No. 219], filed August 19, 2021 by Defendant; "Motion to Review the Valididity [sic] of All Warrents [sic] in Cause # [redacted]" [ECF No. 220], filed August 19, 2021 by Defendant; "Motion to Dismiss Cause # [redacted] under 12(b)1,6 * and Rule 12 Pleadings and Pretrial Motions (A)(IV), and (C)" [ECF No. 221], filed August 19, 2021 by Defendant (collectively, "Motions"); "Government's Omnibus Response to Defendant [redacted] Three Most Recent *Pro Se* Motions, ECF Nos. 219, 220, and 221" ("Response") [ECF No. 225], filed August 30, 2021 by the United States of America ("Government"); and "Pro-Se Defendant [redacted] Response to the 'Omnibus' Response Provided by Assistant United States Attorney for ECF Nos. 219, 220 and 221" ("Reply") [ECF No. 253], filed November 10, 2021 by Defendant. After due consideration of the Motions, Response, Reply, and applicable law, the Motions are **DENIED**.

I. BACKGROUND

A. Factual Background

[redacted] ("Defendant") and his co-defendant, [redacted] ("Co-Defendant"), are under indictment for one count each of Conspiracy to Commit Wire Fraud, Wire Fraud, and Money Laundering.[1] Additionally, Defendant is under indictment on two counts of Bankruptcy Fraud.[2] A warrant for Defendant's arrest was issued on April 4, 2019.[3] He was arrested pursuant to the warrant on April 8, 2019.[4]

Prior to the indictment, the Government requested and executed several court-issued search warrants as part of the investigation into Defendant and Co-Defendant. As a result, the Government gained access to an email address belonging to Co-Defendant;[5] seized funds in two bank accounts held in Defendant's name;[6] searched and seized property located at Defendant and Co-Defendant's alleged business address;[7] and seized additional property, including vehicles and equipment, allegedly belonging to Defendant.[8]

Defendant alleges the Government then gathered contacts from his and Co-Defendant's phone logs and email correspondences and indiscriminately advised these individuals they were

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[1] *See generally* "Indictment" ECF No. 6, filed Apr. 3, 2019.

[2] *Id*.

[3] "Arrest Warrant" 1, ECF No. 15, filed Apr. 4, 2019

[4] *See* "Arrest Warrant Returned Executed" 1, ECF No. 25, filed Apr. 15, 2019 (stating Defendant was arrested on April 8, 2019).

[5] "Search and Seizure Warrant" 1, Case No. [redacted], issued Feb. 14, 2018.

[6] "Warrant to Seize Property Subject to Forfeiture" 1, Case No. [redacted], issued Aug. 3, 2018.

[7] "Search and Seizure Warrant" 1, Case No. [redacted], issued Sept. 4, 2018.

[8] "Search and Seizure Warrant" 1, Case No. [redacted], issued Apr. 5, 2019.

victims of fraud perpetrated by Defendant and Co-Defendant.[9] Defendant further alleges the Government unlawfully created a LinkedIn account purporting to be [redacted], a corporation managed by Defendant and Co-Defendant.[10] The LinkedIn page featured a photograph from the corporation's website to bolster its legitimacy.[11]

B. Parties' Arguments

Defendant moves to challenge and suppress evidence obtained via the arrest warrant,[12] several search warrants,[13] and the investigative techniques used by the Government to discover alleged victims of fraud.[14] He also requests a hearing under *Franks v. Delaware*[15] and makes a claim of "reckless, malicious, and [retaliatory] prosecution."[16]

Regarding alleged investigative techniques, the Government argues Defendant has not established any violation of the Fourth Amendment or statute that would warrant the exclusion of the testimony of any victims of fraud.[17] As to Defendant's request for a *Franks* hearing, the Government contends the affidavits supporting the search warrants are presumed valid and,

[9] "Motion to Suppress 10 of the 11 Perported 'Victims' as Fruit of the Poision Tree" ("Mot. ECF No. 219") 1–2, ECF No. 219, filed July 19, 2021.

[10] *Id*. at 3–4.

[11] *Id*. at 3.

[12] "Motion to Review the Valididity of All Warrents in Cause # [redacted]" ("Mot. ECF No. 220") 5–6, ECF No. 220, filed Aug. 19, 2021.

[13] *See generally* "Motion to Review All Warrents and Their Supporting Evidence Including Sworn Testimony for Validity in Cause: [redacted]" ("Mot. ECF No. 205") 1, ECF No. 205, filed June 11, 2021; Mot. ECF No. 219 at 1; Mot. ECF No. 220 at 1.

[14] *See generally* Mot. ECF No. 219 at 1.

[15] 438 U.S. 154 (1978); Mot. ECF No. 220 at 1.

[16] Mot. ECF No. 220 at 7.

[17] *Id*. at 2–-3

further, Defendant has not met his burden under *Franks*.[18] Finally, the Government maintains Defendant "has stated his belief that he was targeted for prosecution but has offered nothing further that would support his initial burden of a prima facies showing" of vindictive prosecution.[19]

II. LEGAL STANDARD

A. Fourth Amendment

The Fourth Amendment to the Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and mandates "no Warrants shall issue, but upon probable cause."[20] A search by the government implicates the Fourth Amendment when a defendant has a "legitimate expectation of privacy" in the area searched.[21] To demonstrate a Fourth Amendment violation, a defendant must establish such expectation of privacy is both subjectively and objectively reasonable.[22] Pursuant to the exclusionary rule, if a violation is established, direct "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." [23] Finally, the fruit of the poisonous tree doctrine extends the exclusionary rule to secondary evidence derived from the illegally seized evidence itself.[24]

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[18] "Government's Omnibus Response to Defendant [redacted] Three Most Recent Pro Se Motions, ECF Nos. 219, 220, and 221" ("Response") 3–5, ECF No. 225, filed Aug. 30, 2021.

[19] *Id*. at 7.

[20] U.S. CONST. amend. IV.

[21] *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

[22] *United States v. Kye Soo Lee*, 898 F.2d 1034, 1037–38 (5th Cir. 1990).

[23] *United States v. Calandra*, 414 U.S. 338, 347 (1974).

[24] *United States v. Jenson*, 462 F.3d 399, 408 (5th Cir. 1990).

B. Franks Hearing

A government agent seeking the issuance of a search warrant must present a written affidavit under oath containing facts sufficient to "provide the magistrate with a substantial basis for determining the existence of probable cause."[25] Probable cause does not require proof beyond a reasonable doubt; a magistrate need only have a substantial basis for concluding that a search would uncover evidence of wrongdoing.[26] In fact, "probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily."[27] A magistrate's determination of probable cause is entitled to great deference by a reviewing court.[28]

A Fourth Amendment violation may arise where false statements made by the government agent requesting the warrant are included in the supporting affidavit.[29] In certain circumstances, a defendant may obtain an evidentiary, or *Franks*, hearing to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant.[30] Such a challenge "must be more than conclusory and must be supported by more than a mere desire to cross-examine."[31] The defendant must establish: (1) allegations in the supporting affidavit are false; (2) the false allegations were deliberate or were made with a reckless disregard for the truth; and (3) the allegations are so material the remainder of the affidavit is insufficient to

[25] *Illinois v. Gates*, 462 U.S. 213, 239 (1983).

[26] *United States v. Brown*, 941 F.2d 1300, 1302 (5th Cir. 1991).

[27] *Franks v. Delaware*, 438 U.S. 154, 165 (1978).

[28] *Gates*, 462 U.S. at 236 n. 10.

[29] *United States v. Richardson*, 478 F. App'x 82, 83 n.1 (5th Cir. 2012).

[30] *Franks*, 438 U.S. at 171.

[31] *Id.*

support a finding of probable cause.[32] In support, "[t]hey should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons."[33] Even if a defendant satisfies the first two prongs of the test, they are not entitled to a *Franks* hearing if, when the falsehood is set aside, "there remains sufficient content in the warrant affidavit to support a finding of probable cause."[34] Only if the false statements are "necessary to the finding of probable cause" does the Fourth Amendment require a hearing.[35] Indeed, there is a "presumption of validity with respect to the affidavit supporting the search warrant."[36] A defendant must make a "substantial showing" in proving the evidence should be suppressed.[37]

C. Miranda Warnings

The Fifth Amendment to the Constitution guarantees "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[38] In *Miranda v Arizona*, the Supreme Court explained an individual's Fifth Amendment privilege against self-incrimination is "jeopardized" when he or she is in custody and subjected to questioning.[39] Thus, the Court held

[32] *United States v. Dickey*, 102 F.3d 157, 161–62 (5th Cir. 1996) (citing *Franks*, 438 U.S. at 171).

[33] *Franks*, 438 U.S. at 171.

[34] *Dickey* 102 F.3d at 161–62; *United States v. Privette*, 947 F.2d 1259, 1261 (5th Cir. 1991).

[35] *Franks*, 438 U.S. at 156.

[36] *Id.*

[37] *Id.*

[38] U.S. CONST. amend. V.

[39] 384 U.S. 436, 478 (1966).

that a person subject to custodial interrogation must be given specific warnings designed to safeguard his or her Fifth Amendment rights.[40]

Police officers are not required to issue *Miranda* warnings to every person they arrest or question—only those subject to "custodial interrogation."[41] A suspect is "in custody" for purposes of *Miranda* "when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest."[42] Further, "interrogation" refers not only to express questioning, but also to any words or actions on the part of the police—other than those normally attendant to arrest and custody—that the police should know are reasonably likely to elicit an incriminating response from the suspect.[43]

The defendant bears the initial burden of establishing they were subject to custodial interrogation.[44] Once the defendant establishes a prima facie case of custodial interrogation, the burden shifts to the government to establish that any waiver of the defendant's Fifth Amendment rights comported with the requirements of *Miranda* and its progeny.[45]

D. Vindictive Prosecution

The Fifth Amendment's Due Process Clause prohibits prosecutors from punishing defendants for exercising their constitutional or statutory rights.[46] For example, a prosecutor's

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[40] *Id*. at 444–45.

[41] *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

[42] *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988) (en banc).

[43] *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

[44] *United States v. Charles*, 738 F.2d 686, 692 (5th Cir. 1984).

[45] *United States v. De La Fuente*, 548 F.2d 528, 533 (5th Cir. 1977).

[46] U.S. CONST. amend. V; *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969).

use of the charging process solely as a penalty for pursuing an appeal would violate the due process clause.[47] However, the government retains "broad discretion" to enforce the United States' criminal laws.[48] "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[49]

The defendant must establish prosecutorial vindictiveness by a preponderance of the evidence.[50] In general, there are two ways a defendant can prove a claim of vindictiveness. First, a defendant may prove actual vindictiveness by presenting objective evidence that the prosecutor's actions were designed solely to punish a defendant for asserting his legal rights, and the reasons proffered by the government are pretextual.[51] Second, a defendant may show sufficient facts to give rise to a presumption of vindictiveness.[52] Success on either course is rare, particularly in the pre-trial context.[53]

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[47] *Wasman v. United States*, 468 U.S. 559, 564 (1984) (citing *Pearce*, 395 U.S. at 725).

[48] *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

[49] *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

[50] *United States v. Krezdorn*, 718 F.2d 1360, 1365 (5th Cir. 1983) (en banc).

[51] *United States v. Saltzman*, 537 F.3d 353, 364 (5th Cir. 2008).

[52] *United States v. Goodwin*, 457 U.S. 368, 374 (1982); *Saltzman*, 537 F.3d at 359–60 ("The presumption of vindictiveness is a prophylactic rule designed to protect a defendant's due process rights where a danger exists that the government might retaliate against him for exercising a legal right . . . courts will apply it only where there exists a 'realistic likelihood of vindictiveness' . . . [examining] the prosecutor's actions in the context of the entire proceedings.").

[53] *See Goodwin*, 457 U.S. at 381.

III. DISCUSSION

A. Arrest Warrant

Defendant asserts he was illegally detained due to the fact he was "apprehended and processed by the El Paso division of [the] FBI and taken into custody without ever being [read his *Miranda* warnings]," pursuant to an arrest warrant issued April 4, 2019.[54]

However, Defendant's challenge fails as a matter of law. Although he claims he was under formal arrest, Defendant makes no allegations that the officers interrogated him while he was in custody. As such, his *Miranda* rights were not implicated. Nor does Defendant allege there are statements he seeks to suppress. The Supreme Court's holding in *Miranda* protects an individual's statements from being improperly used at trial.[55] Thus, Defendant's *Miranda* challenges to the arrest warrant and subsequent arrest are denied.

B. Search Warrants

Defendant requests a *Franks* hearing as three warrants "were falsely sworn as was the supporting evidence purposely fabricated."[56] The first warrant he challenges was issued on August 3, 2018 and gave the Government legal authority to seize the funds in two bank accounts held in Defendant's name.[57] Defendant argues, the Government in its affidavit in support of the warrant stated Defendant blackmailed a client by withholding occupancy permits until the client purchased additional products from Defendant's business.[58] Defendant contends the

[54] Mot. ECF No. 220 at 6.

[55] *See Miranda v. Arizona*, 384 U.S. 436, 471–73 (1966).

[56] Mot. ECF No. 205 at 1.

[57] "Warrant to Seize Property Subject to Forfeiture" 1, Case No. [redacted], issued Aug. 3, 2018.

[58] Mot. ECF No. 220 at 3.

Government agent "fabricated [this] story" as occupancy permits can only be produced by city officials or an active fire marshal.[59]

Without reaching any conclusions regarding the first two prongs of the *Franks* test, Defendant's claim fails the third prong. The allegation that Defendant withheld occupancy permits from a client was not "necessary to the finding of probable cause."[60] The affidavit in support of the warrant provides extensive information relating to interviews by the Government of at least two other alleged victims of fraud perpetrated by Defendant, as well as information relating to alleged criminal conduct by Defendant during a bankruptcy hearing.[61] Such information was more than sufficient to establish probable cause to support the warrant.

Next, Defendant challenges the warrant issued on September 4, 2018 authorizing the Government to search and seize evidence at the business address of [redacted], located at [redacted].[62] Defendant argues the Government agent made a false statement in the supporting affidavit when the agent claimed stolen windows and doors belonging to a client were on their premises.[63] In addition, Defendant argues the warrant was for [redacted], not [redacted]. This is significant to Defendant as he states [redacted], not [redacted]

[59] *Id*.

[60] *Franks v. Delaware*, 438 U.S. 154, 157 (1978).

[61] *See generally* "Affidavit in Support of Seizure Warrant" 4–11, Case No. [redacted], filed Aug. 3, 2018.

[62] Mot. ECF No. 220 at 3.

[63] *Id*.

[redacted], was the leaseholder of the property at the time of the warrant and search.[64]

Contrary to Defendant's claim, the affidavit does not mention stolen windows or doors. Further, Defendant's assertion that the warrant was for a search of the business address of [redacted] is incorrect. The text of the warrant gave explicit authorization for the Government to search the address of [redacted].[65] Moreover, the affidavit in support stated [redacted] is also known as "[redacted]."[66] Regardless of the business entity on the lease agreement, the Government properly sought to search the address of where Defendant admits to conducting business. Therefore, Defendant's challenge to the warrant issued on September 4, 2018 fails.

Lastly, Defendant challenges a warrant issued on April 5, 2019 granting the Government permission to search [redacted] and seize numerous items, including several vehicles and equipment.[67] The affidavit lists various serial numbers belonging to items to be confiscated on the property.[68] Defendant alleges the serial numbers

[64] *Id*. at 5.

[65] "Search and Seizure Warrant" 1, Case No. [redacted], issued Sept. 4, 2018.

[66] "Affidavit in Support of an Application for a Search Warrant" 3–4. Case No. [redacted], filed Sept. 4, 2018.

[67] "Search and Seizure Warrant" 1, Case No. [redacted], issued Apr. 5, 2019.

[68] *See generally id*.

were collected during the "illegal" search and seizure conducted pursuant to the warrant issued on September 4, 2018 and thus are "fruit of the [poisonous] tree."[69]

Defendant failed to assert a cognizable challenge to the search warrant issued on September 4, 2018. It follows, then, the information obtained through the execution of that warrant cannot be said to be tainted. Thus, Defendant's challenge to the use of serial numbers belonging to property found at his business address in the warrant issued on April 17, 2019 is denied.

C. Investigative Techniques

Defendant seeks to suppress evidence relating to ten alleged victims of fraud perpetrated by Defendant and Co-Defendant as "fruit of the [poisonous] tree."[70] According to Defendant, the Government obtained the identities of the "victims" pursuant to "two separate illegal fishing expeditions."[71] First, the Government sought out "victims" when it allegedly made several calls to contacts in Defendant and Co-Defendant's phone logs and email correspondences. Additionally, the Government created a LinkedIn account to "impersonate" [redacted] to further gather information on and make contact with other potential "victims."

Absent from Defendant's assertions is a cognizable violation of his Fourth Amendment rights. As an initial matter, the Government properly obtained a search warrant for the contents of Defendant and Co-Defendant's phone logs and email correspondences. Further, a search by the government only implicates the Fourth Amendment when a defendant has a "legitimate expectation of privacy" in the area searched.[72] Assuming the Government did set up the

[69] Mot. ECF No. 220 at 4.

[70] Mot. ECF No. 219 at 3.

[71] *Id.*

[72] *Rakas v. Illinois, 439 U.S. 128, 143 (1978).*

LinkedIn page, Defendant makes no cognizable claim that in doing so the Government breached his "legitimate expectation of privacy." Defendant has no legitimate expectation of privacy in pictures or information he made publicly available on the internet,[73] nor does Defendant have an expectation of privacy in the names or information of any alleged victims of fraud. Therefore, Defendant's request to suppress evidence relating to the ten alleged victims of fraud is denied.

D. Vindictive Prosecution

Finally, Defendant makes repeated allegations that the Government is recklessly, maliciously, and retaliatorily prosecuting him in this cause.[74] In support, Defendant points to a culmination of "illegal actions" allegedly taken by the Government against him—including "falsely swearing" affidavits, withholding exculpatory evidence from the grand jury, and perjury by Government agents.[75]

Without addressing the veracity of the allegations in support of Defendant's assertion of vindictive prosecution, Defendant's claim fails as a matter of law. To succeed on a vindictive prosecution claim, a defendant must establish that an action taken by the prosecutor was intended solely to punish the defendant for asserting a legal right.[76] Absent from Defendant's argument are allegations he asserted a legal right and thereafter faced adverse consequences by the Government. Therefore, Defendant's claim based upon vindictive prosecution is denied.

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[73] *See United States v. Landry*, 729 Fed.Appx. 345, 345–46 (5th Circ. 2018).

[74] Mot. ECF No. 219 at 1; Mot. ECF No. 220 at 4, 6; Mot. ECF No. 221 at 3.

[75] *Id*.

[76] *United States v. Saltzman*, 537 F.3d 353, 364 (5th Cir. 2008).

IV. CONCLUSION

Defendant has not established he is entitled to relief under the Fourth and Fifth Amendments to the Constitution. Accordingly:

1. It is **HEREBY ORDERED** "Motion to Review All Warrents and Their Supporting Evidence Including Sworn Testimony for Validity in Cause: [redacted]" [ECF No. 205] is **DENIED**.

2. It is **FURTHER ORDERED** that "Motion to Suppress 10 of the 11 Perported 'Victims' as Fruit of the Poision Tree" [ECF No. 219] is **DENIED**.

3. It is **FURTHER ORDERED** that "Motion to Review the Validitity of All Warrents in Cause # [redacted]" [ECF No. 220] is **DENIED**.

4. It is **FURTHER ORDERED** that "Motion to Dismiss Cause # [redacted] under 12(b)1,6 * and Rule 12 Pleadings and Pretrial Motions (A)(IV), and (C)" [ECF No. 221] is **DENIED**.

SIGNED AND ENTERED this [redacted] day of [redacted].

[redacted]
UNITED STATES DISTRICT JUDGE

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WRITING SAMPLE: MICHIGAN LAW REVIEW WRITE-ON COMPETITION SUBMISSION

This writing sample was my submission for the *Michigan Law Review* Write-On Competition. The question posed was whether U.S. district courts should issue universal injunctions. The writing contained within this document is exclusively my work.

BROAD DISCRETION OR ABUSE OF POWER? THE CASE AGAINST UNIVERSAL INJUNCTIONS

INTRODUCTION

In recent decades the use of universal injunctions, also called nationwide injunctions, to halt federal policy has become a politically polarizing issue dependent on "whose-ox-is-being-gored."[1] Most notoriously, federal district courts issued universal injunctions barring Obama's amnesty program for undocumented immigrant parents of United States citizens and blocking President Trump's executive order banning travel by the nationals of seven predominantly Muslim countries into the United States.[2] The Trump Administration has been subject to at least twenty-two nationwide injunctions in its first year alone.[3]

These injunctions are becoming increasingly common, but can their use be justified?[4] Typically, a plaintiff seeking an injunction must establish the following: they are likely to succeed on the merits, they are likely to suffer irreparable harm in the absence of relief, the balance of equities tips in their favor, and an injunction is in the public interest.[5] Injunctions are to be no more burdensome to the defendant or broader "than necessary to provide complete relief to the plaintiffs."[6] However, when courts issue nationwide injunctions, a single judge is adjudicating the rights of non-parties and refereeing "abstract political fights," going beyond what is required to provide relief to the parties before the court.[7] Critics have called their use "unprecedented judicial power grabs" and "judicial adventurism."[8]

This note criticizes the current use of universal injunctions and argues that U.S. district courts should refrain from issuing these type of injunctions until clear procedures become established. Part I contends that the employment of universal injunctions lacks both historical and textual justification. Part II argues that the use of universal injunctions hinders equitable and reasoned administration of the law and these policy considerations outweigh the benefits of their use. Part

III maintains that the current practice of issuing universal injunctions lacks guiding principals, and proposed reforms may remedy the issues.

I. The Modern Use of Universal Injunctions is Historically and Textually Unsubstantiated

For a district court to have the authority to issue universal injunctions, that right must come from a statute or the Constitution.[9] No statute expressly grants the judiciary the authority to issue universal injunctions.[10] Thus, the power to issue these injunctions must come from a "generic statute that authorizes equitable relief" or the "courts' inherent constitutional authority."[11] In either case, the form of an injunction must be consistent with "our history and traditions."[12]

However, the use of universal injunctions run contrary to the language of the Constitution.[13] Article III of the Constitution gives federal judges the judicial power to decide "Cases" and "Controversies" before it.[14] Implicit in this limitation is the requirement that a plaintiff must demonstrate standing for each claim and form of relief he seeks.[15] Standing requires a plaintiff to show a specific injury to himself and bars vindication of the rights of others.[16] In sum, a court typically has no power to award relief to parties that are not before it.[17]

Supporters argue the text of Article III does not explicitly define the scope of a court's remedial powers.[18] Moreover, they argue no rule has ever barred courts from issuing injunctions that provide relief to a plaintiff that encompasses non-parties.[19] However, the Supreme Court has repeatedly interpreted the power to render a decree to be consistent with the exercise of such powers in English courts of equity from where we derive modern injunctive practice.[20]

Indeed, English courts of equity limited relief to the parties before it.[21] Equity courts originated as a means to provide relief when common law courts were inadequate, and because they had no power to enjoin the King, they had no authority to grant universal injunctions.[22]

American courts inherited this tradition, and for most of American history these types of injunctions were not issued.[23] It was not until almost two centuries after America's founding before a court issued the first universal injunction.[24] Regardless of where district courts claim their authority originates from, universal injunctions are "[in]consistent with our history and traditions."[25]

Advocates reject this notion and maintain the bill of peace allowed English courts to fashion injunctions that affected non-parties. [26] However, this remedy restricted relief to situations where the class of non-parties was small and cohesive with a common interest.[27] The general rule was that "all persons materially interested in the subject matter of a suit" became parties to it.[28] The bill of peace was more like a proto-type class action than a universal injunction.[29] Moreover, supporters maintain early American courts could "fashion injunctions that protected the rights of non-parties," but those benefits were merely incidental and not representative of equitable principles.[30]

Not only is there a lack of express or implicit historical or textual authority for district courts to issue universal injunctions, their use undermines well-established legal rules.[31] In *Mendoza*, the Supreme Court held the doctrine of nonmutual offensive collateral estoppel is limited to private litigants and does not apply against the government.[32] Nonmutual offensive collateral estoppel occurs when "the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party."[33] Universal injunctions run afoul of this exception because they permit only one final adjudication on an issue and foreclose the government from relitigation in different circuits.[34]

Additionally, universal injunctions sidestep "the specific mechanism that the law provides for large numbers of similarly situated persons to pursue relief efficiently: the class action system."[35]

The requirements under Federal Rule of Civil Procedure 23(b)(2) govern class-wide injunctive remedy, suggesting broad remedies are available only if litigants meet those conditions. [36] When courts provide nationwide relief in the absence of a nationwide class, plaintiffs have no incentive to seek class certification.[37] The absence of class actions for such expansive litigation threatens "judicial economy, accuracy, and rights articulation" and produces a "preclusive asymmetry" where collateral estoppel or a system-wide decree binds the government if the plaintiff wins, but does not bind other claimants if the plaintiff loses.[38]

II. Universal Injunctions Hinder Equitable and Reasoned Administration of the Law

The use of universal injunctions also hinders equitable and reasoned administration of the law.[39] Policy considerations demonstrate the adverse effects of universal injunctions make their current use unjustifiable in light of their benefits.

For example, plaintiffs seeking universal injunctions have incentives to forum shop.[40] Forum shopping occurs when a litigant chooses a jurisdiction they are likely to win in because they need only one district judge to invalidate a rule in their favor and issue a nationwide injunction.[41] In fact, under the Obama administration, five nationwide injunctions barring his policy initiatives were issued by Texas district courts alone.[42] Forum shopping in litigation of "high-profile, politically-sensitive cases" may "harm … the public's confidence in the rule of law and the fairness and impartiality of the federal judiciary."[43] It enables an anomalous judge to freeze enforcement of a policy on grounds most judges would reject, undermining the congeniality between the federal courts.[44]

Supports argue that forum shopping is not limited to cases involving nationwide injunctions.[45] However, they concede this is still a "valid concern" and advocate for

congressional intervention to curtail it.[46] Regardless of where forum shopping comes from, it undermines the legitimacy of our judicial system.

Additionally, universal injunctions prevent legal questions from percolating through the federal courts.[47] When different parties litigate the same issue in different forums, challenging questions of law benefit from development in different factual contexts and diverse analyses.[48] Percolation allows the most cogent arguments to advance and can lead circuits to resolve conflicts on their own.[49] Universal injunctions frustrate the development of the law and deprive appellate courts of a broader range of experimentation because they "freeze[] the first final decision rendered on a particular legal issue."[50]

Advocates assert that other courts can still weigh in on the matter once a universal injunction is issued.[51] However, while other circuits can review decisions and issue their own opinions, the original decision is still binding on them.[52] Other supporters argue there is a lack of evidence percolation yields better-reasoned decisions, yet they find merit in its practice and hold that percolation is "useful."[53] Accordingly, our system benefits more from the presence of percolation than in its absence.

Furthermore, the Supreme Court typically waits until there is a circuit split before they decide to hear a case, but district courts issuing universal injunctions make every case a national emergency.[54] These injunctions cause the Supreme Court to hear these cases in a rushed manner, with fewer facts and a lack of a trial record, and without the benefit of divergent opinions by lower courts.[55] If this trend continues, one critic notes the Supreme Court will begin "to decide major constitutional questions not in order to resolve circuit splits[,] but instead to address stays of district court preliminary injunctions."[56]

Lastly, universal injunctions deprive other potential claimants of the right to have their claims adjudicated under the law in other forums.[57] Plaintiffs might obtain nationwide relief without the knowledge or participation of other potential claimants; Short of intervening, potential claimants are effectively deprived of their ability to participate.[58] Critics argue issuing universal injunctions infringes on the due process rights of potential claimants by adjudicating their legal claims without their consent.[59] Additionally, a plaintiff bringing common claims in non-class litigation can enter into a settlement without the input from potential claimants.[60] Hence, universal injunctions leave potential claimants out of the equation.

While nationwide injunctions may have some benefits such as judicial efficiency and uniformity, their harmful side effects will only become more exacerbated if we continue to allow district courts to issue universal injunctions without clear procedures to limit these adverse consequences.

III. District Courts Issuing Universal Injunctions Currently Lack Guiding Principals, But Proposed Reforms May Solve the Problem

Currently, district courts rarely engage in a "reasoned decision making process" or offer any justification when determining a particular injunctive scope.[61] Others offer only "conclusory declarations" to rationalize the scope of their relief.[62] Some courts refuse to issue nationwide injunctions without a nationwide class altogether, even when plaintiffs prove broad injury.[63] The lack of guiding principals or uniform rules for when to issue a universal injunction creates unrestrained judicial discretion and indefinable frameworks for contextualizing whether an injunction is within the bounds of accepted judicial authority or not.[64]

This lack of procedure sets up the possibility of conflicting injunctions.[65] Two different district courts may create conflicting obligations placed on the federal government, making

compliance with both logically impossible.[66] This result leaves the Supreme Court as the only court with authority to resolve the conflict, forcing the government in a precarious position of choosing which court order to comply with until the Supreme Court settles the issue.[67]

Many legal analysts have proposed solutions that both create order and solve legal and policy issues created by universal injunctions. One such solution is requiring plaintiffs seeking a nationwide injunction to file a class action according to Federal Rule of Civil Procedure 23(b)(2).[68] Recently, Congress has proposed a bill prohibiting injunctions involving non-parties unless a party represents the non-party in a class action.[69] Other solutions envision a modification to Federal Rule of Civil Procedure 65, adding the complete relief principle as a formal requirement for injunctive relief.[70] Another legal scholar proposes that nationwide injunctions be issued only by three-judge district courts with the right to directly appeal to the Supreme Court.[71] Lastly, an additional remedy proposes that before issuing an injunction, the court balances the following: the characteristics of the parties before the court, the nature of the claim, and the consequence of the remedy on the circuit involved.[72]

While this list of proposed solutions is not exhaustive, they are creative responses created to curtail the issues associated with issuing nationwide injunctions, while also formally authorizing district courts to act.

CONCLUSION

District court judges "are not the Supreme Court, and [they] should not presume to decide legal issues for the whole country."[73] Still, it is clear universal injunctions are not going away anytime soon and serve beneficial purposes. Congress should propose a solution that gives courts an explicit grant of authority to issue these injunctions while resolving their adverse side effects. However, until that happens, district courts should refrain from issuing universal injunctions.

[1] *See* Jason L. Riley, *When District Judges Try to Run the Country*, WALL ST. J. (July 17, 2018, 6:55 PM), https://www.wsj.com/articles/when-district-judges-try-to-run-the-country-1531868155; Brian Wolfman (@brian_wolfman), TWITTER (Feb. 11, 2019, 7:44 AM), https://twitter.com/brian_wolfman/status/1094985472982597633.

[2] *See* Nicholas Bagley & Samuel Bray, *Judges Shouldn't Have the Power to Halt Laws Nationwide*, ATLANTIC (Oct. 28, 2018), https://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471/.

[3] WILSON C. FREEMAN, CONG. RESEARCH SERV., LSB10124, THE TRAVEL BAN CASE AND NATIONWIDE INJUNCTIONS 2 (2018).

[4] Trump v. Hawaii, 129 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

[5] *See Teaching Legal Docs: Understanding Injunctions*, INSIGHTS ON LAW AND SOC'Y, Winter 2014, at 16, 17.

[6] Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2140 (2017).

[7] *See* Bagley & Bray, *supra* note 2.

[8] *See* Riley, *supra* note 1.

[9] *Trump*, 129 S. Ct. at 2425 (Thomas, J., concurring).

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] Memorandum from Att'y Gen. on Nationwide Injunctions to Heads of Civil Litig. Components & U.S. Attorneys 2 (Sept. 13, 2018).

[14] *See* U.S. Const. art. III, § 2.

[15] Memorandum from Att'y Gen., supra note 13, at 2.

[16] *See Trump*, 129 S. Ct. at 2428 (Thomas, J., concurring).

[17] *See* FREEMAN, *supra* note 3, at 1-2.

[18] *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1080 (2018).

[19] *Id*.

[20] Memorandum from Att'y Gen., *supra* note 13, at 3.

[21] *Id*.

[22] *See Trump*, 129 S. Ct. at 2427 (Thomas, J., concurring).

[23] *See* Memorandum from Att'y Gen., *supra* note 13, at 3.

[24] *See Trump*, 129 S. Ct. at 2428 (Thomas, J., concurring).

[25] *Id.* at 2425.

[26] *See* Frost, *supra* note 18, at 1081.

[27] Matthew Erickson, *Who, What, and Where: A Case for A Multifactor Balancing Test as A Solution to Abuse of Nationwide Injunctions*, 113 Nw. U. L. Rev. 331, 357 (2018).

[28] *See Trump*, 129 S. Ct. at 2427 (Thomas, J., concurring).

[29] *Id.*

[30] *Id*; Brief for Legal Historians as Amici Curiae Supporting Plaintiff-Appellee, Whitaker v. City of Chicago, No. 17-CV-9440 (2018) (No. 17-3443).

[31] *See* Memorandum from Att'y Gen., *supra* note 13, at 6.

[32] United States v. Mendoza, 464 U.S. 154 (1984).

[33] City of Chicago v. Sessions, 888 F.3d 272, 288 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part).

[34] *Id*.

[35] *See* Memorandum from Att'y Gen., *supra* note 13, at 6.

[36] FED. R. CIV. P. 23(b)(2); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 464 (2017).

[37] Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2022 (2015).

[38] *See Id*. at 2017.

[39] *See* California v. Azar, 911 F.3d 558, 583 (9th Cir. 2018).

[40] Memorandum from Att'y Gen., *supra* note 13, at 6-7.

[41] *See* Bagley & Bray, *supra* note 2.

[42] City of Chicago v. Sessions, 888 F.3d 272, 288 (7th Cir. 2018).

[43] *See* Memorandum from Att'y Gen., *supra* note 13, at 6.

[44] Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/.

[45] *See* Frost, *supra* note 18, at 1105.

[46] *Id*.

[47] *See* Bray, *supra* note 36, at 461.

[48] *See* California v. Azar, 911 F.3d 558, 583 (9th Cir. 2018).

[49] *See* Memorandum from Att'y Gen., *supra* note 13, at 4.

[50] *See* United States v. Mendoza, 464 U.S. 154 (1984).

[51] *See* Frost, *supra* note 18, at 1108.

[52] *See* City of Chicago v. Sessions, 888 F.3d 272, 297 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part).